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Supreme Court, U.S.
DEC
Clerk

No. 560

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Negro locomotive firemen, on their own behalf and as representatives of the class of Negro locomotive firemen, pray that a writ of certiorari issue to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The opinion of the District Court for the Northern District of Ohio is reported at 156 F. Supp. 89 and appears at pp. 298-304 of the Joint Appendix.[1] The opinion of the Court of Appeals for the Sixth Circuit is not yet reported, but is printed as Appendix A, *infra*, p. 24.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were entered on November 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The Brotherhood of Locomotive Firemen and Enginemen is the exclusive bargaining representative under the Railway Labor Act for the craft or class of locomotive firemen and as such the Brotherhood represents Negro as well as white firemen in their collective bargaining relationships with the employing railroads. The Brotherhood refuses to admit Negro firemen to membership solely because of their color and thus denies them voice and vote in the formulation of bargaining objectives and the selection of bargaining officials. Does this action by the Brotherhood:

(1) Deny to Negro firemen their right under the Railway Labor Act to fair and equal representation by their exclusive bargaining representative?

(2) Violate the due process provision of the Fifth Amendment in that it constitutes arbitrary exclusion from the statutory bargaining process by an agency sufficiently

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[1] The Joint Appendix was printed as the record in the Court of Appeals and is attached to this petition for certiorari for the convenience of the Court.

"governmental" in nature to warrant the application of constitutional safeguards?

Statute Involved

The statute involved is the Railway Labor Act, 45 U.S.C. 151 et seq., pertinent provisions of which are set forth in Appendix B, *infra*, p. 32.

Statement

Petitioners, Negro firemen, brought this action in the District Court for themselves and others similarly situated, challenging their exclusion from their exclusive bargaining representative under the Railway Labor Act, the Brotherhood of Locomotive Firemen and Enginemen, whose Constitution limits its membership to persons "white born" (J.A. 35). Petitioners seek admission into the Brotherhood on the ground that the fair and equal bargaining representation which the Brotherhood is legally obligated to provide Negro firemen under the *Steele* doctrine,[2] the Railway Labor Act, and the Fifth Amendment, is denied them as long as they are excluded from participation in the formulation of the Brotherhood's bargaining objectives and denied voice and vote in the selection of its bargaining officials.

The essential facts concerning petitioners' exclusion from Brotherhood membership and the consequent denial of voice, vote and even information with respect to collective bargaining are not in dispute. The Brotherhood's exclusive bargaining relationship status under the Railway Labor Act (J.A. 20), its limitation of membership pursuant to the Brotherhood Constitution to persons "white born"

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[2] *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192; see also *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768; *Syres* v. *Oil Workers*, 350 U.S. 892; *Conley* v. *Gibson*, 355 U.S. 41.

(J.A. 34, 35), and the exclusion of Negro firemen from the elections wherein the bargaining officials are chosen (J.A. 218), are all conceded by respondents. Not only do respondents admit the denial to Negro firemen of voice and vote in the selection of the bargaining officials, but they concede further serious disadvantage to Negro firemen arising from the denial of opportunity to participate in the Brotherhood's deliberations or even to be informed thereof: In answers to petitioners' interrogatories prior to trial (J.A. 32-33), respondents admitted (Interrogatories 1 and 2) that monthly or quarterly reports to lodges and local chairmen by the General Chairman of the Brotherhood, which reports are not "readily available" to non-members, include information about "demands served upon railroads for agreements on new matters and changes in the existing collective agreement, served under Section 6 of the Railway Labor Act, and also information regarding the progressing of such demands in collective bargaining"; that "the President of the Brotherhood is required by the Constitution of the Brotherhood to issue monthly bulletins or circulars to other Grand Lodge officers, recording secretaries of lodges, legislative representatives, General and Local Chairmen, and Secretaries of General Grievance Committees, of the work of collective bargaining conducted by the Brotherhood on a national or regional scale, and of other matters of interest to the membership as a whole" (Interrogatory 3), which sources of information are not readily available to non-members (Interrogatory 4); and that non-members cannot attend Local Lodge meetings where "matters of general interest to locomotive firemen are discussed" including "reports of negotiations with carriers regarding changes in the governing agreement, decisions on time claims and grievance cases, assignments of runs and possible or impending changes in

assignment of runs, the set-up of pools, etc." (Interrogatories 5 and 6).[3]

Petitioners could have rested upon these admitted facts of their exclusion from membership and thus from all voice and vote in the formulation of bargaining objectives and the selection of their bargaining officials. At the trial, however, petitioners went even further to show the various forms of hostile discrimination and unfair treatment to which they have so long been subjected by the Brotherhood and which they will continue to suffer so long as they are denied political power within the the agency which controls their conditions of employment. Petitioners demonstrated that for over fifty years the Brotherhood and its officers have sought to limit the employment rights of Negro firemen and to eliminate them from the railroads and replace them with white Brotherhood members (J.A. 211-215; 238-243; 306-322).[4] Petitioners' witnesses produced evidence of continuing discrimination and hostility by the Brother-

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[3] The respondents have had the temerity to suggest throughout this litigation that an appropriate substitute for the information supplied to Brotherhood members in these different ways is the availability to Negro firemen of the Brotherhood's monthly magazine and of the weekly newspaper "Labor" published by sixteen railway labor organizations (see e.g., Brief On Behalf Of Appellees in the court below, pp. 14-15). Nothing could better demonstrate the cavalier attitude of the Brotherhood towards Negro firemen and the consequent impossibility of fair and equal representation without membership.

[4] This Court has expressed itself vigorously upon the Brotherhood's record of discrimination and hostility. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232. The latest case in this series, *Graham*, involved the refusal by respondents to accept this Court's earlier decisions in *Steele* and *Tunstall*, evoking this Court's sharp comment on the discriminatory practices of the Brotherhood:

"It is needless to recite additional details of the present case. What it adds to the governing facts of the earlier cases is a continuing and

hood right down to the present day: special privileges recently accorded white firemen over Negroes (J.A. 48-50); white firemen regularly permitted to earn more pay than Negroes (J.A. 104); a bribe the Brotherhood offered so that a white fireman could take a Negro's job (J.A. 86-88); a Negro fireman unable to get his days off on the weekend, so he could go to church, a privilege accorded to white firemen (J.A. 130-132); a white "swing man" recently added to a run to reduce the mileage of Negro firemen (J.A. 137-140); the Brotherhood's refusal to take up grievances for the Negro firemen (J.A. 54-55, 159-161) and to its failure to help equalize facilities for them (J.A. 56, 89, 129-130). A dramatic piece of evidence of the Brotherhood's attitude towards the voteless Negroes it represents in collective bargaining was the testimony of a seventy-year-old fireman on the Gulf, Mobile & Ohio Railroad. He related the statement made to him by the Brotherhood's General Chairman in 1951 after Federal District Judge Mullins had entered a decree pursuant to the *Steele* doctrine for the protection of Negro firemen: "Judge Mullins gave it to you but I will sure as hell see you don't keep it" (J.A. 75).[5]

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willful disregard of rights which this Court in unmistakable terms has said must be accorded to Negro firemen."

The Court's view of the Brotherhood's conduct can be seen also in its unusual action in *Graham* of ordering its mandate to go down "forthwith", thus seeking to end "continuing and willful disregard of rights" of Negroes at the earliest possible moment.

The Brotherhood sought below to shrug off this Court's decisions with the comment that its arguments had not "*stood much chance of being heard above the cry of race prejudice that dominated this litigation*" (Brief, p. 5).

[5] Respondents attempted no direct refutation of this demonstrated continuing hostility and discrimination. *None* of the local brotherhood officials to whom petitioners' witnesses ascribed hostile and discriminatory conduct were called in rebuttal. Respondents' case, as presented by three of its highest officials, amounted to no more than a series of self-serving generalizations concerning Brotherhood policies which provided no refutation whatever of the specific testimony concerning specific acts of discrimination by specified Brotherhood officers (J.A. 168, 243, 271).

In the light of the conceded exclusion of petitioners from the meetings where firemen deliberate upon and formulate bargaining objectives and select and elect the bargaining officials, the District Court was compelled to find and found that petitioners' exclusion from the Brotherhood denies them equality in the statutory bargaining process: "There is no question that the evidence presented establishes the fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their conditions of employment and other matters relating to such employment" (J.A. 300). Nevertheless, the Court could find neither statutory nor constitutional authority to require admission of petitioners into the Brotherhood. In enacting the Railway Labor Act, the Court said, "Congress did not intend to require admission of Negroes to membership" (J.A. 301). As concerns the Fifth Amendment's due process guarantee, the Court found it inapplicable because "the certification of the Brotherhood of Locomotive Firemen and Enginemen as exclusive bargaining representative . . . is not sufficient to change the character of the organization from that of a private association to that of a governmental agency"[6] (J.A. 303).

The Court of Appeals affirmed. Although recognizing that a "Negro fireman cannot become a member of the Brotherhood under existing provisions of the Brotherhood's Constitution, nor may any firemen who are not members of the Brotherhood attend meetings of its Local

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[6] While petitioners' case was pending on appeal in the Court of Appeals for the Sixth Circuit, this Court had under consideration *Conley* v. *Gibson*, 355 U.S. 41. Because the briefs in the *Conley* case appeared to raise a question of exclusion from union membership, petitioners sought certiorari before judgment in the Court of Appeals so that the two cases might be considered together. The *Conley* case was decided, however, without reference to the issue of denial of union membership and thereafter this Court denied certiorari before judgment. 355 U.S. 893.

Lodges", a two-judge panel [7] ruled against petitioners "for the reason that this record does not show an agency of the federal government to have been responsible for appellants' plight." Denominating the Brotherhood "a private association" not subject to "judicial control", the Court adopted the view of the trial court that sufficient "federal action" was not presented to "subject the membership policies of the . . . Brotherhood to judicial control." [8]

REASONS FOR GRANTING THE WRIT

The Holding of the Court Below, Which Sanctions Exclusion of Negroes from Their Exclusive Bargaining Agent Under the Railway Labor Act, Raises Important Federal Questions and Conflicts With Applicable Decisions of This Court.

Solely because of their color (J.A. 35), petitioners are denied membership in the Brotherhood which is their exclusive bargaining representative under the provisions of the Railway Labor Act with the various railroads upon which petitioners are employed (J.A. 20). Without membership in the Brotherhood, petitioners cannot participate in the selection and election of the Brotherhood officials who do the bargaining and cannot attend the Brotherhood meetings

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[7] The case was argued to a panel of the Court consisting of Circuit Judges Martin, Miller and Stewart. While the case was awaiting decision, Judge Stewart became an Associate Justice of this Court and did not participate in the decision, opinion or judgment below. See p. 31, *infra*.

[8] Neither court below questioned the fact that under the *Steele* case the Brotherhood is sufficiently "governmental" to warrant judicial invalidation of agreements bargained in violation of its duty of equal representation. But both courts held that the Brotherhood is not sufficiently "governmental" to warrant judicial relief to secure equal voice in the bargaining process by all members of the craft. Although petitioners' counsel continuously urged the applicability of *Steele* and following cases, neither court examined or sought to distinguish *Steele*.

where the bargaining objectives are discussed (J.A. 33, 218). The courts below refused to hold that this discrimination in "representation and participation" (J.A. 300) flowing from the exclusion of petitioners from Brotherhood membership violates their rights either under the Fifth Amendment or the Railway Labor Act.

The constitutional and statutory question thus presented is an important one calling for this Court's review.[9] The racial exclusion still practiced by some of the nation's largest labor unions, renders a substantial number of Negroes second class citizens in collective bargaining under federal law.[10] See Sections A & B, pp. 9 to 16, *infra*. This racial exclusion continues despite the repeated decisions of this Court holding statutory bargaining representatives and analogous agencies to standards of non-discriminatory conduct no less rigorous than those constitutionally imposed on governmental bodies. See Section C, pp. 17 to 21, *infra*. Finally, the day-to-day racially discriminatory exercise of federally-supported exclusive bargaining power is wholly inconsistent with public acceptance of this Court's decisions requiring elimination of segregation in state-supported institutions. See Section D, pp. 21-22, *infra*.

A. *The exercise of exclusive statutory bargaining power for Negroes by officials chosen by members of a union open only to white raises a vital Fifth Amendment issue.*

Without membership and participation Negro workers are denied the equal representation which the Constitu-

[9] Informative discussion may be found in Hewitt, *The Right to Membership in a Labor Union*, 99 Univ. of Pa. Law Rev. 919, and Summers, *The Right to Join a Union*, 47 Col. Law Rev. 33.

[10] See Handbook of Union Government Structure and Procedures (1955), National Industrial Conference Board, Inc., pp. 63-64.

tion guarantees to all persons regardless of race in the exercise by a statutory bargaining representative of federally-created exclusive bargaining power. Available judicial authorities support this proposition.

In *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831, the Supreme Court of Kansas was of the opinion that a collective bargaining agent under the Railway Labor Act cannot "lawfully exclude eligible Negro workmen from full participation in privileges incident to the Act and admit them to membership only in a 'separate lodge' which 'shall be under the jurisdiction of and represented by the delegate of the nearest white local.'" The Court held:

> "The petition alleges not only that Negro employees are denied the right to take part in such local affairs of the union as the election of officers and the fixing of dues, but are denied the right to participate in determining the position to be taken by the union, as bargaining agent for all employees, as to wages, hours, working conditions, and other such matters vitally affecting their economic welfare. . . . The acts complained of are in violation of the Fifth Amendment."[11]

An eloquent exposition of the difference between equal representation through equal participation and unequal representation through non-participation is found in the late Chief Judge Groner's concurring opinion in

[11] Respondents below cited *Ross* v. *Ebert*, 275 Wisc. 523, 82 N.W. 2d 315, a decision of the Wisconsin Supreme Court, as holding to the contrary. That decision, however, has no bearing upon the instant case because the defendant union there was not the statutory bargaining representative for the aggrieved Negro workers. Petitioners here predicate their right to membership on the ground that respondent Brotherhood, the exclusive statutory bargaining representative, may not bar Negroes from participation in the statutory bargaining process. The decision in *Ross* is thus not in any sense inconsistent with the petitioners' cause of action.

Brotherhood of Railway and Steamship Clerks v. *United Transport Service Employees*, 137 F. 2d 817, 820 (C.A.D.C. 1943), reversed by this Court on other grounds, 320 U.S. 715. Judge Groner compared the system of representation without participation employed by certain national labor unions with the "taxation without representation" to whose evils history gives eloquent attestation. Speaking of the effect of the action of the National Mediation Board in placing Negro employees in a bargaining unit represented by a Brotherhood in which they could not become members, Judge Groner said:

> "The effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make Negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that the Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the [Railway Labor] Act as to make the Board's decision upholding it wholly untenable and arbitrary . . . . nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association."

The Supreme Court of California has said of such racially-exclusive "representation" as here involved:

> "It is difficult to see how a union can fairly represent *all* the employees of a bargaining unit unless it is willing to admit all to membership, giving them the opportunity to vote for union leaders and to participate in determining union policies." *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 735, 155 P. 2d 329.

Finally, this Court itself has said of collective bargaining "representation" without participation that:

> "To deny a fellow-employee membership because of race, color or creed may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether union members or not." *Railway Mail Ass'n.* v. *Corsi*, 326 U.S. 88, 94.

Denial of voice and vote in the election of bargaining representatives and the formulation of bargaining objectives manifestly denies Negro firemen equal representation. Equal participation in a fair hearing before a representative tribunal is the sine qua non of a fair decision. It was the judgment of the founding fathers, one repeatedly validated by the teaching of experience, that without the right of free participation before a representative tribunal, substantive determination is necessarily tainted.

When the respondent Brotherhood deprives Negro firemen of membership, closing to Negroes the doors of the Brotherhood meeting where bargaining objectives are formulated and forcing upon them exclusive representation

by bargaining officials in whose selection they have no vote, it denies rights without which the bargained conditions of employment are constitutionally tainted, whether or not those conditions of employment be fair and equal or unfair and discriminatory.[12] Equal statutory bargaining representation for Negro workers requires equal participation in the bargaining process, regardless of race, no less than it requires that the bargained agreement afford equal treatment to all workers, regardless of race.

And while participation in the bargaining representative and the bargaining process is constitutionally required in order to afford Negro firemen equality of representation, membership and participation is constitutionally required for its own sake as well. Membership in a union which is the statutory bargaining representative affords vital ad-

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[12] There is no question in this case that petitioners are discriminated against in the sense that they are denied voice, vote and information in the determination of their working conditions. Proof that the working conditions bargained are themselves actually discriminatory is not a necessary part of petitioners' case, but petitioners will, if certiorari is granted, demonstrate on this record the extent to which exclusion from the statutory bargaining agent necessarily results in, and did here result in, actual discrimination against them. The court below indicated that there was no "issue of actual discrimination by the Brotherhood" in this case. See pp. 26, 28, *infra*. In so indicating, the court misconstrued the findings of the District Judge who had apparently found actual discrimination in the day-to-day operations of the Brotherhood (J.A. 300) but was unable to "state definitely" (J.A. 299) that certain major bargaining changes negotiated by the Brotherhood reducing mileage and the like, were adopted "for the purpose of discrimination against the Negroes" (J.A. 299). Since the testimony concerning day-to-day discrimination was never controverted (see n. 5, p. 6, *supra*), the District Court did not find, and indeed could not have found, an absence of actual discrimination. Furthermore, whatever may have been the *purpose* of some of the major mileage changes negotiated by the Brotherhood, it is undeniable that their primary *effect* is upon Negro firemen, who hold the highest seniority in their craft, and who have been reduced in mileage for the benefit of junior white firemen. Given political power within the union to select bargaining officials, it is by no means inconceivable that some of these mileage changes having primary adverse effect upon Negro firemen might successfully have been resisted by them.

vantages to the member. Participation with fellow workers in the formulation of bargaining objectives through debate and persuasion and the possibility of election to officership with consequent participation in negotiations with the employer is in itself a right not to be lightly discounted. The assumption of collective responsibilities through officership and participation in the group deliberations which precede negotiations with the employer provide experience and relationships essential to the growth and advancement of the individual among his fellow workers and in his employment.[13]

We think it clear that the Fifth Amendment forbids the exercise of exclusive statutory bargaining power for Negroes by a union open only to whites and compels statutory bargaining representatives to exercise their bargaining power only through a process of free membership participation available to all regardless of race.[14] In any event, the question is of such manifest importance as to require review by this Court.

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[13] It is advantages of this sort upon which this Court based its earlier determinations against segregation in higher education, which deprives Negroes of social and psychological benefits available to persons attending white universities. *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637; *Sweatt* v. *Painter*, 339 U.S. 629.

[14] Respondents argued below that petitioners would not benefit from membership because the Brotherhood's bargaining officials are unresponsive to the will of the membership. They said that members of the Brotherhood do not determine Brotherhood policy or decide upon its collective bargaining objectives since the officers responsible for such matters arrive at their own decisions, uncontrolled by any form of direct dictation from the membership (Brief, pp. 15-17).

Perhaps undemocratic practices of the union will render petitioners' membership in the Brotherhood less valuable than hoped, but this hardly excuses denial of the right altogether. Racial exclusion cannot be justified by the circumstance that, once admitted, the Brotherhood will refuse petitioners effective control over the Brotherhood's bargaining decisions not because they are Negroes, but because the bargaining officials do not heed the expressed desires of the membership. Indeed, respondents' insistence that its bargaining officials determine bargaining objectives

B. *Racial exclusion from membership and participation in the bargaining representative raises an important question under the Railway Labor Act.*

A construction of the Railway Labor Act which avoids the necessity of a constitutional adjudication (see *United States* v. *Rumely*, 345 U.S. 41; *United States* v. *CIO*, 335 U.S. 106) is readily available here. Petitioners urged the courts below and ask this Court to read the Railway Labor Act to forbid racial exclusion by the statutory bargaining representative, and thus to avoid the necessity of a constitutional adjudication. Indeed, petitioners ask for little if any extension of the construction of the Act already adopted by this Court in *Steele*, for racial exclusion from participation is necessarily precluded by the very requirement of equal representation this Court there found implicit in the Railway Labor Act.

Moreover, denial of participation is not only incompatible with implied requirements but is likewise precluded by the language of the Railway Labor Act. Congress provided in that Act (45 U.S.C. 152, Fourth) that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." The very term "representatives" denotes persons chosen by vote of the class whom they represent. The right to bargain "*through representatives of their own choosing*" is plainly denied petitioners by virtue of their exclusion from the Brotherhood whose members alone select and elect the bargaining officials.

The courts below refused to find in the Railway Labor Act a proscription of racial exclusion, declaring that "Ap-

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uncontrolled by any dictation from the membership defeats their argument; if respondents' claims of benevolent union paternalism by the bargaining officials are correct, denial to Negroes of the ballot in the election of those officials subjects them not only to racial paternalism but to racial autocracy as well.

parently the Act itself would not have been acceptable to the Congress if Negro membership in the agent had been required," (J.A. 302-303; p. 27, *infra*). This conclusion was predicated on the Senate's rejection, fifteen years after the enactment of the Railway Labor Act, of an amendment proposed by Senator Jenner which would have prohibited racial exclusion by the statutory representative.[15] But the Senate Committee Report on the bill which Senator Jenner sought to amend (Senate Rep. No. 2262, 81st Cong., 2d Sess.) specifically preserved the vitality of the doctrine in the *Steele* case at a time (1950) when the Supreme Courts of Kansas and California had already found that doctrine to preclude racial exclusion by the bargaining representative. *Betts* v. *Easley, supra; James* v. *Marinship Corp., supra.* The rejection by the Senate of Senator Jenner's amendment is properly construed as having been intended merely to leave the problem of union racial exclusion in the hands of the courts, which had already asserted judicial authority to grant relief against discriminatory and exclusionary practices.

Judicial comity towards the legislature and the presumption that Congress acts in good faith compels the conclusion that Congress has not authorized the racially exclusive exercise of statutory power by the statutory representative. At any rate, the question whether Congress has authorized or prohibited racial exclusion by the bargaining agent under the Railway Labor Act should not longer be left in doubt.

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[15] This amendment was proposed during the enactment of the union-shop amendment to the Railway Labor Act. Act of Jan. 10, 1951, 64 Stat. 1238.

C. *The holding of the court below disregards this Court's rulings concerning the private exercise of governmental and governmentally derived responsibilities.*

The court below rests its decision on the assertion that "the Brotherhood is a private association, whose membership policies are its own affair . . " (p. 30, *infra*). Though recognizing petitioners' plight, the court below insists that petitioners did "not show an agency of the federal government to have been responsible for . . . "[this] plight" (p. 30, *infra*) and affirmed the District Court's holding that "sufficient federal action was not present to subject the membership policies of the . . . Brotherhood to judicial control" (p. 24, *infra*). We respectfully submit that the holding below that the exclusive statutory bargaining agent under the Railway Labor Act is a "private association" free from judicial control in its exercise of statutory bargaining power conflicts with the applicable decisions of this Court.

In *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, this Court interpreted the Railway Labor Act to impose upon the very Brotherhood here involved the duty of fair and equal representation of Negro firemen and it found this duty imposed by the Railway Labor Act because grave constitutional questions would have accompanied any other result. Speaking of the respondent Brotherhood, this Court stated that it is "clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights" (323 U.S. at 198). In the same vein, the Court pointed out that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and re-

strict the rights of those whom it represents . . ." (323 U.S. at 202). The Brotherhood's argument that it was a "private association", not subject to judicial review of its discriminatory practices, received short shrift in this Court for the precise reason that the Court found the Brotherhood clothed "with powers comparable to those possessed by a legislative body . . ." Certainly, if the Brotherhood is sufficiently "governmental" in nature to require that it give equal representation to Negro firemen, it is sufficiently "governmental" in nature to require that it give those Negro firemen the membership and participation indispensable to afford them equal representation.[16]

In *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 401-402, this Court made clear that labor unions clothed "with powers comparable to those possessed by a legislative body" are, for some purposes at least, to be treated as "governmental." The Court there said:

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[16] Respondents have sought to make much of the statement in the *Steele* case that the Railway Labor Act "does not deny to such a bargaining labor organization the right to determine eligibility to its membership . . ." 323 U.S. at 204. But this statement could hardly have been an approval by the Court of the very racial discrimination which it had just termed "obviously irrelevant and invidious" (323 U.S. at 203). Furthermore, if this statement could conceivably be construed, contrary to both the letter and spirit of *Steele*, as a dictum permitting racial exclusion, it certainly could not have survived this Court's recent decision that separation of the races is inherently unequal treatment. Indeed, the enforced inequality of racial segregation is far clearer in the labor area than in education. In finding segregated schooling inherently unequal, this Court emphasized the resulting psychological and social barriers for Negroes. The inequalities involved here are even more obvious; petitioners do not sue for the right to non-segregated instruction, but for the right to participate with their white fellow-workers in the meetings and elections at which their most vital and fundamental rights are determined—the hours of labor, wages, retirement age, runs, assignments—all the working conditions bargained with the employers. If the Fifth Amendment precludes segregation and exclusion of Negroes in public education, it necessarily precludes segregation and exclusion of Negro firemen from the election of those who exercise statutory bargaining power on their behalf and from participation in the statutory bargaining process whereby their employment rights are determined.

"Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them. See *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332 (1944). The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself. See *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232; *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210; *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 255; *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 94.

We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such. But it is plain that when Congress clothes the bargaining representative 'with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents,' the public interest in the good faith exercise of that power is very great."

Certainly, the minimum obligation that the Brotherhood incurs for the Government's "thumb on the scales" is allowance of equal participation by all whom it represents, irrespective of their race, creed or color.[17]

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[17] By establishing the statutory bargaining scheme and empowering the representative exclusively to act for all, Congress has not only put its thumb on the scales but has itself created the scales and prescribed the

Actually, this Court went even further in *Brotherhood of Railway Trainmen* v. *Howard*, 343 U.S. 768, than in either of the two foregoing cases. In *Howard*, this Court squarely held that a union given statutory bargaining rights under the Railway Labor Act could not use its "position and power to destroy colored workers' jobs in order to bestow them on white workers" (343 U.S. at 774) even though the union had no statutory bargaining relationship to those colored workers. The Court stated unequivocally that "bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers" (343 U.S. at 774). The *Howard* case thus holds a statutory bargaining agent under the Railway Labor Act to a far higher standard of conduct than that for which petitioners here contend; it holds that a statutory bargaining agent may not arbitrarily exercise its power even against those for whom it holds no statutory responsibility. Certainly, if a union is held to standards of fairness in its action towards those it does not legally represent, it cannot be subject to less stringent standards in its exercise, for those whom it does represent, of the federally-derived statutory power itself.

The question to what extent private agencies may be held to governmental standards of conduct has been many times considered in recent years. See, e.g., *Smith* v. *Allwright*, 321 U.S. 649; *Marsh* v. *Alabama*, 326 U.S. 501; *Shelley* v. *Kraemer*, 334 U.S. 1; *Public Utilities Commission* v. *Pollak*, 343 U.S. 451; *Terry* v. *Adams*, 345 U.S. 461; *Barrows* v.

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weights to be put thereon. If in a day when federal laws have reshaped entire areas of personal activity and economic reality, as they have in the labor field, basic constitutional prohibitions do not accompany statutory powers vested in private persons, then Congress may do by indirection in the most fundamental and far-reaching conditions of employment what it could not do directly with respect to the smallest and least significant matter of federal concern.

Jackson, 346 U.S. 249; *Pennsylvania v. Board of Directors*, 353 U.S. 230. Certainly the consistent trend of this Court's decisions is towards holding those exercising governmental or governmentally-derived power to a standard of non-discriminatory conduct. Petitioners' case requires no more than the reiteration of a principle to which this Court has adhered in a firm line of prior decisions.

D. *Negro membership in labor unions will further the orderly elimination of segregation.*

Racial exclusion is still practiced by some of the Nation's largest labor unions.[18] The corrosive effect of racial segregation and exclusion by these powerful statutory bargaining representatives is not limited to the Negroes who are deprived of a voice in the determination of their rights, nor to the whites who close the doors of the union hall to their Negro fellow workers; the racial exclusion practiced by these unions is a continuous threat to the elimination of segregation in public schools, public facilities, and other vital areas. The picture of a labor union exercising federally-created exclusive bargaining power over disenfranchised Negro employees is a constant reminder of federally-sanctioned second-class citizenship, wholly inconsistent with and contrary to public acceptance of federal equality guarantees.

A reversal of this picture through the accomplishment of labor union integration would be an important forward step in that process of orderly adjustment which this Court is seeking to insure by its "deliberate-speed" mandate. Integration in the field of labor would advance public acceptance of integration in other areas of community life where, unlike

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[18] See Handbook of Union Government Structure and Procedures (1955), National Industrial Conference Board, Inc., pp. 63-64.

the situation found in the labor movement, the races have not previously had regular contacts and common interests. What we have here are white and Negro workers who work together, eat together, go on strike together, and share those personal ties which render the continued exclusion of the Negro firemen from the Brotherhood a cruel and corrosive vestige of a bygone era.[19]

An authoritative determination by this Court that statutory bargaining representatives may not exclude Negroes from membership would at once eliminate an ugly racial practice ostensibly carried on under federal auspices, and at the same time promote the program of "deliberate-speed" desegregation by demonstrating the ability of whites and Negroes to engage in constructive common activity in an integrated union hall.

Conclusion

Petitioners and the others in their class, all advanced in age because almost no Negro firemen have been hired for many years, desire first-class union citizenship before they are forced to depart from the railroads by death or retirement. The present action has been pending in the courts for over four years. Recognizing that petitioners have long suffered hostile discrimination at the hands of the very men who are authorized by federal law to represent them, this Court has in the past seen fit to take speedy action to protect their rights. See, e.g., *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232. We respectfully urge that the Court grant certiorari to

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[19] Continuing exclusion of Negroes is rendered all the more anomalous by the fact that it is practiced primarily by large national unions neither controlled nor dominated by Southern members, and defended on no better grounds than the antiquity of the racial barrier in the union's constitution.

determine the vital issues here involved and that it set the case for argument at this term of Court.

Respectfully submitted,

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December, 1958.

APPENDIX A

No. 13,387

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LEE OLIPHANT, ET AL, *Appellants*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL., *Appellees*.

Appeal from the United States District Court for the Northern District of Ohio

Decided November 26, 1958

BEFORE MARTIN and MILLER, Circuit Judges.

PER CURIAM. Appellants are Negro firemen who brought suit in the United States District Court for themselves and others similarly situated, seeking admission to membership in the Brotherhood of Locomotive Firemen and Enginemen whose constitution limits membership to applicants "white born". This appeal is from an order of the United States District Court denying the relief requested, for the reason that sufficient federal action was not present to subject the membership policies of the Appellee Brotherhood to judicial control. The opinion of the district court may be found at 156 F. Supp. 89; certiorari denied, 355 U. S. 893.

The Brotherhood is and for many years has been designated, in accordance with the Railway Labor Act [45 U. S. C. A., 151, et seq.], as the statutory bargaining representative for the locomotive firemen, hostlers, and hostler helpers, hereinafter collectively referred to as "firemen". A Negro fireman cannot become a member of the Brotherhood under existing provisions of the Brotherhood's Constitution, nor may any firemen who are not members of the Brotherhood attend meetings of its local lodges.

Appellants advance a double-barreled hypothesis, which roughly parallels the two judicial approaches to racial segregation in public education. Their first argument is that, inasmuch as racial exclusion from public schools is inherently a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment [*Brown* v. *Board of Education*, 347 U. S. 483 (1954)] and of due process of law guaranteed by the Fifth Amendment [*Bolling* v. *Sharpe*, 347 U. S. 497 (1954)] it follows that denial of membership in the duly elected statutory bargaining representative, based upon race, is inherently incompatible with the rights afforded by the Fifth Amendment to the Constitution of the United States and by the equal protection and equal representation guaranteed to them by the doctrine of *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U. S. 192 (1944). There, the Supreme Court held that "the language of the [Railway Labor] Act * * * read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. * * *" [323 U. S. 192, 202-3]. In short, appellants' first argument is that, as a matter of law, their constitutional rights and those enumerated in the *Steele* case are denied them as long as they are ineligible for membership in the exclusive collective bargaining agency which undertakes to represent their craft. They state in their brief: "Denial of voice and vote in the election of bargaining representatives and the formulation of bargaining objectives in and of itself denies Negro firemen equal representation."

If denial of membership in the Brotherhood is held to be not in violation of their rights as a matter of law, appellants assert that they are entitled to membership on a second and alternative ground. Cases decided under the earlier "separate but equal" doctrine of public schooling proscribed racial exclusion where in fact equal schooling was denied. See *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sweatt* v. *Painter*, 339 U. S. 629 (1950). Analogizing their case to the stated doctrine, these appel-

lants assert that the Brotherhood is in fact guilty of discriminatory practices and that the removal of the racial barrier to Brotherhood membership alone will afford them some measure of relief from discrimination.

In his carefully considered opinion, Chief Judge Paul Jones decided the facts pertaining to discrimination adversely to the contention of appellants. He stated the position of the Negro firemen to be that the "Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the 'gouge' rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70." The Judge continues: "* * * these alleged acts of discrimination [will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discriminating against the Negroes." 156 F. Supp. 89, 90.

A meticulous examination of the detailed record in this case has been made by us, resulting in our opinion that the above findings of the district court are eminently correct and are supported by substantial evidence. There is, therefore, no occasion for further consideration of appellants' second argument.

Accordingly, we address ourselves solely to the contention advanced by the appellants that exclusion from membership in their collective bargaining representative based upon race is inherently a denial of their rights as a matter of law.

The appellee's authority as collective bargaining "representative" of the fireman craft is derived from the Rail-

way Labor Act, which contains, *inter alia*, the following definition: "Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." 45 U. S. C. A. 151. The Brotherhood was duly elected as bargaining representative in accordance with provisions of the Act. Nowhere does the statute manifest the intention of Congress to establish criteria for membership in the bargaining representative. Nor can it be said that the attention of the Congress was not directed to the fact that some craft members were being denied membership in certain railway labor organizations by virtue of their race. An amendment to the Act (later tabled) proposed to refuse certification to any such organization which denied membership on the basis of race. The able district judge observed: "Apparently the Act itself would not have been acceptable to the Congress if Negro membership in the agent had been required." 156 F. Supp., at page 93. The Supreme Court points out in its opinion in the *Steele* case, *supra*, that "the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership * * *." 323 U. S. at page 204. In our judgment, the language of the statute does not support reasonably any other interpretation.

A perusal of the Railway Labor Act makes it abundantly clear that no means of direct control over the actions of the agent selected by a majority of the craft was reserved by the statute to the individual employees. Apparently, the only supervision which any individual may exercise over the duly-elected bargaining representative is the threat of casting his vote in favor of a different representative at a subsequent election. The objective of Congress was industrial tranquility in the arteries of commerce. In choosing the method by which this goal could be achieved, it was deemed necessary to take from individual employees the right to negotiate their own contracts of employment. The question presented on the record before us is whether or not the Congress transcended the constitutionally protected rights of individual employees

when it stripped them of their bargaining privileges as individuals and conferred that function upon a majority-elected representative, over which the individual has no direct control and in which he is not eligible for membership. It is not contended that the Negro firemen are deprived of their voting rights in the election of a bargaining representative. Their complaint is that they are a minority group whose rights are abridged, for the reason that, as a result of their ineligibility for membership in the appellee Brotherhood, they have no control over the internal affairs of the representative elected by the majority.

Although these proceedings have been punctuated by accusations of racial discrimination, it would seem that we are really concerned only with ascertaining the rights of any person who, for any reason, finds himself in a minority or out-voted status, the issue of actual discrimination by the Brotherhood having been subtracted from the issue by the findings of the district judge, as hereinbefore stated. Various facets of the collective bargaining process involving the rights of the minority have already been litigated before the Supreme Court. That tribunal has decided against the validity of agreements respecting changes of pay negotiated by individuals after pay rates had been established by collective agreement. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342.

Individual contracts of employment have been held to be superseded by collective agreements subsequently entered into by the employer and the craft representative. *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332. There, the Supreme Court discussed at length the underlying principles of the collective bargaining process, with no indication of Constitutional infirmity: "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment. * * * The workman is free, if he values his own bar-

gaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." 321 U. S. 332, 338, 339.

There are other decisions of the Supreme Court approving Acts of Congress which, in a limited way, interfere with the right of an individual to negotiate for employment-contract provisions palatable to his individual taste. On the subject of the power of the Congress to facilitate the flow of interstate commerce by enacting the union shop amendments to the Railway Labor Act, the highest tribunal said: "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained. * * * The task of the judiciary ends, once it appears that a legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." *Railway Employees' Department* v. *Hanson*, 351 U. S. 225, 233, 234.

The wisdom of this policy of judicial self-restraint was recognized here in the opinion of the United States District Court: "* * *. To compel by judicial mandate membership in voluntary organizations where the Congress has knowingly and expressly permitted the bargaining agent to prescribe its own qualifications for membership would be usurping the legislative function. The Congress has entered the field of, and made provision for, labor relations and furnished means of adjusting labor disputes between employers and employees of interstate railways. For injustices due to discrimination or inadequate representation and participation to employees who are not members of the bargaining agent, the employees must look to the legislative, not the judicial branch of constitutional government." 156 F. Supp. 89, 93.

The Fifth Amendment to the Constitution of the United States protects the fundamental rights of individuals from invasion by federal governmental action. Unlike the Fourteenth, that amendment contains no equal protection guarantee. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584 (1937); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Appellants insist that we, by interpretation, should expand the due process clause of the Fifth Amendment to encompass an equal protection guarantee in the same manner that the Supreme Court recently accomplished that result in the field of public education, in *Bolling* v. *Sharpe*, 347 U.S. 497. Assuming, (without deciding) that we should place such an interpretation on the Fifth Amendment, appellants, in our judgment, are still not entitled to the relief sought, for the reason that this record does not show an agency of the federal government to have been responsible for appellants' plight.

The accusing finger is pointed at the Congress. Only one analysis could tend to lay the responsibility for appellants' situation on our national legislative branch of government; that is, the violation of the Fifth Amendment by the Congress, in its enactment of the Railway Labor Act without including therein a provision requiring a labor union—when duly elected as collective bargaining representative of a craft—to extend membership privileges to all members of the craft, regardless of race. We cannot accept this fine-spun hypothesis, which charges the Congress with federal action of a type proscribed by the Fifth Amendment.

Recent decisions of the Supreme Court in the field of administration of public schooling are not analogous to the instant case. *Brown* v. *Board of Education* and *Bolling* v. *Sharpe*, *supra*, were predicated on the fact that *affirmative* legislation of the states and the District of Columbia, respectively, denied Negroes access to schools supported by public tax funds. These decisions are not applicable here.

The Brotherhood is a private association, whose membership policies are its own affair, and this is not an appropriate case for interposition of judicial control. A de-

cision to the contrary could be frustrated by the simple expedient of the majority's electing directly those individuals presently designated by the union to negotiate with the employer railroads. There is no requirement that employees be represented by persons of the same race. In *National Federation of Railway Workers* v. *N. M. B.*, 110 F. (2d) 529, 538; certiorari denied, 310 U. S. 628, it was said that "under the Act, employees are guaranteed the right to select a common bargaining representative and that representative may be a person of any race or color (or association made up of persons of any race or color). The quality of opportunity thus guaranteed is the complete antithesis of discrimination. To hold that colored employees could be represented only by colored persons for bargaining purposes would be to introduce into the administration of the Act the very discrimination which the Federation seeks to avoid."

For the reasons stated herein and those found in the opinion of the United States District Judge, the judgment is affirmed.

This case was argued to a panel of the court consisting of Martin, Miller and Stewart, Circuit Judges. Judge Stewart became an Associate Justice of the Supreme Court of the United States before a decision was reached or this opinion was prepared. He, therefore, did not participate in the decision, opinion, or judgment in this case.

APPENDIX B

PERTINENT PROVISIONS OF THE RAILWAY LABOR ACT

45 U.S.C. § 151.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * * * *

45 U.S.C. § 152.

Second. All disputes between a carrier or carriers and its or their employees shall be considered and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice,

and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And Provided Further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in

the manner prescribed in such agreements or in section 156 of this title.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 560.

LEE OLIPHANT, *et al.*,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The respondents disagree with the petitioners' statement of the questions presented by the complaint and the evidence of record in this case.

The first question stated by the petitioners is concerned with whether a provision in the constitution of the Brotherhood of Locomotive Firemen and Enginemen which excludes various classes of persons, including Negroes, from membership in the Brotherhood, denies to petitioners a right given them by the Railway Labor Act, to wit, the right to "fair and equal representation." This question suggests that the answer to the petitioners' contention can be arrived at by *interpreting* the Railway Labor Act.

The language of the Railway Labor Act provides no answer to the petitioners' contention. The Act contains not the remotest reference to the subject of *membership* in labor organizations. This Court so recognized in its de-

cision in *Steele v. L. & N. R. R. Co.*, 323 U. S. 192, at 204. An answer to this question will be found in the Railway Labor Act only if the power to legislate is substituted for the process of interpretation.

The second question posed by the petition is whether a labor organization designated to represent a craft of employees for the purposes of the Railway Labor Act becomes an agency of the Federal Government and its actions as craft representative thereby become subject to the Due Process Clause of the Fifth Amendment. The respondents believe this proposition is too gossamer to invite serious consideration by any court.

The collective agreements that are negotiated by a railway brotherhood establish the terms of employment for employees within a craft, including those employees who are not members of the brotherhood, in exactly the same manner today as they did during the decades prior to the enactment of the Railway Labor Act. The Negro firemen and other firemen who are white but who have not been members of the respondent Brotherhood have never negotiated their own terms of employment with the southeastern carriers. They have always rendered their services subject to the terms established by the collective agreements negotiated by the Brotherhood. The reason why this is true is a matter of common knowledge in the railway industry.

The carriers bargained in the past with the railway brotherhoods only when, and because, the brotherhoods possessed the loyalty and support of at least a majority of the employees within the craft. Furthermore, two scales of pay or two standards of employment cannot, as a practical proposition, exist side by side within one craft.

The Railway Labor Act has had no more than a metaphysical influence on this situation. The Act, as in-

terpreted by this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, and related decisions, merely forbids an individual employee or a minority group within a craft from doing something which they never had the power or the desire to do previously.

It is completely unrealistic to say that, because the Congress has made the collective bargaining agreement dominant over the terms of employment negotiated by individual employees with their employer, the effect of this exercise of the legislative power is to make the union selected to represent the craft an agency or arm of the Federal Government.

The respondents believe that the question posed by the complaint and the evidence of record in this case was correctly stated by the Court of Appeals, as follows:

> "The question presented on the record before us is whether or not the Congress transcended the constitutionally protected rights of individual employees when it stripped them of their bargaining privileges as individuals and conferred that function upon a majority elected representative, over which the individual has no direct control and in which he is not eligible for membership."

STATEMENT

The petitioners' statement of the circumstances that gave rise to the questions of law which this Court is asked to rule upon, omits certain facts and circumstances which the respondents believe will have a bearing upon the Court's decision to grant or deny the petition for certiorari. The facts and the circumstances referred to are the following:

For all that the petition discloses, the provision in the Brotherhood's constitution which excludes Negroes from

membership may be a recently adopted restriction. The truth is that this restriction on membership has been a law of the Brotherhood since the inception of the organization more than 75 years ago. (R. 206a.) This restriction on membership was perfectly valid when adopted. It was a valid restriction when the original Railway Labor Act was enacted on May 20, 1926. And, insofar as counsel for respondents are aware, it was a valid restriction when the Railway Labor Act was amended substantially on June 21, 1934.

A second circumstance is that the petitioners' statement permits the assumption that the constitutional restriction on membership in the Brotherhood excludes only Negroes, and, hence, the question before the Court poses merely a problem of racial discrimination. The fact is that the constitutional provision imposes a variety of restrictions on membership in the Brotherhood. This provision reads as follows:

> "(a) An applicant for membership must be actually employed as a locomotive fireman, engineman, engine hostler, hostler helper, engine dispatcher, employed handling engines in or about round house or ash pit, in shop yards, locomotive works or industrial plants, motorman or helper on electric engines, motor or gas cars on roads where electric energy is used or has been substituted for steam, or holding seniority rights as such, at the time he makes his application; provided, he shall not be a member of any other labor organization assuming to represent engineers, firemen, hostlers or hostler helpers, except the Brotherhood of Locomotive Engineers, nor shall he be a member of any organization of employees which at any time, in any manner, endeavors to interfere with the policy or action of this Brotherhood. Engine hostlers or engine dispatchers are persons who actually handle and are responsible for the care

of locomotives. Foremen who act as hostlers and receive hostlers' pay shall be eligible to membership. Hostler helpers are persons who are assigned and required to assist hostlers. Traveling engineers, traveling firemen and motormen employed on street railways are not eligible to membership.

"(b) He shall be white born, of good moral character, sober and industrious, not less than sixteen (16) years of age, and be able to read and write the English language and understand our constitution. Mexicans, or those of Spanish-Mexican extraction, are not eligible. Should the provisions of this paragraph or any portion thereof, be in violation of or in conflict with the laws of the United States, Canada or of any state or province, as contained in statutes or court decision, then in that event the provisions of such law shall supersede the provisions of this paragraph to the extent required to bring about conformation to such law and to remove the violation or conflict." (R. 34a-35a.)

While, admittedly, the plaintiffs in this action are all Negroes, and they have, for the time being, restricted their challenge to that part of the constitutional provision which requires applicants for membership to be "white born," yet the legal basis that allegedly exists for challenging the validity of this restriction as applied to Negroes, applies with equal force to the many other restrictions on membership contained in the constitutional provision quoted above.

The petitioners' thesis is that a labor union which functions as a craft representative is required by some law of the land to open the doors of membership to all persons within the craft in order that all may participate equally in the so-called process of formulating collective bargaining objectives. (Petition, pp. 9-14.) If the op-

portunity for equal participation in collective bargaining councils by all employees within the craft, through membership in the organization representing the craft, is in truth a requirement of the law, then surely the conclusion that must be drawn is that this law proscribes any attempt by the craft representative to insist upon a selective membership.

The third circumstance that should be weighed by the Court is the fact that the Brotherhood is more than a labor organization. The Brotherhood has been a fraternal benefit society since its inception, conducting a large insurance and social program for its members.

The Brotherhood has an auxiliary organization known as the Ladies' Society of the Brotherhood of Locomotive Firemen and Enginemen. The members of the Ladies' Society are the wives, mothers and sisters of the Brotherhood members. The Society has a total membership of between 44 and 45 thousand. Its activities are largely social. Its members conduct joint social meetings with lodges of the Brotherhood (R. 170).

Fourth, the petitioners launched this action on the stated premise that the Brotherhood has continuously used its position since November, 1951, as representative of the firemen's craft to oppress the Negro firemen because of their race or color, by depriving them of their employment rights.[1] The significance of the November, 1951, date is that it marked the end of a series of suits, of which the *Steele* case was the vanguard, which challenged the validity of the Southeastern Carriers' Conference

[1] The appellants explain that they seek in this action the unique remedy of a court order requiring the Brotherhood to take them into membership because the remedy provided by the doctrine announced in the *Steele* case is too cumbersome and slow (R. 298-301).

Agreement of February 18, 1941, and also attacked the Brotherhood's collective bargaining proposal to the southeastern carriers that Negro firemen be promoted to engineers in the order of their seniority in the same way that white firemen are promoted to engineers. In the agreements that settled this litigation, the Brotherhood and the southeastern carriers agreed that permanent injunctions should be issued forbidding them to discriminate, on the basis of race or color, against the Negro firemen, and also, that the Negro firemen would not be required to take their turn for promotion to engineer (R. 325a and 328a). The injunctions protecting the Negro firemen against being promoted to engineers is qualified to the extent that it applies only to the Negro firemen in employment when the settlement agreements were signed. The Negro organizations agreed that with respect to Negroes newly employed after November, 1951, the Brotherhood would have the right to use any power necessary to persuade the carriers to apply alike to all firemen, regardless of race, the rules governing promotion to engineer (R. 325a, para. 3; R. 330a, para. 3).

During the trial of the instant case the petitioners contended that the alleged continuing racial discrimination practiced against them by the Brotherhood and the carriers and affecting their employment rights has taken four forms. These are:

(1) The minimum mileage regulation rules have been reduced by agreement between the Brotherhood and the carriers, and this reduction has the effect of reducing the monthly income of the Negroes;

(2) A so-called "gouge" rule is applied to the Negro firemen in an unlawful manner, so as to reduce their earnings;

(3) The mileage regulation rules are applied to Negro firemen and not to "demoted" engineers; and,

(4) The Brotherhood and the carriers have entered into agreements establishing a compulsory retirement rule for firemen at age 70.

The District Court found against the petitioners' contention that they are the victims of racial discrimination.

The Court of Appeals for the Sixth Circuit took an extraordinary length of time to review this case and it affirmed the District Court's findings in the following forceful language:

> "In his carefully considered opinion, Chief Judge Paul Jones decided the facts pertaining to discrimination adversely to the contention of appellants. He stated the position of the Negro firemen to be that the 'Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the "gouge" rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70.' The Judge continues: '* * * these alleged acts of discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discriminating against the Negroes.' 156 F. Supp. 89, 90.

"A meticulous examination of the detailed record in this case has been made by us, resulting in our opinion that the above findings of the District Court are eminently correct and are supported by substantial evidence." [2] (Emphasis ours.)

This Court has repeated many times the rule it follows when issues of fact have been resolved by the concurrent findings of a district court and a court of appeals. In *Page v. Rogers*, 211 U. S. 575 at 577, this Court stated:

"* * * counsel urged with great earnestness that the findings of fact in the two courts below were erroneous, and we were invited to consider the evidence again in that view. But the rule is well established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings, unless clear error is shown."

More recently, in *Allen v. Trust Co. of Ga.*, 326 U. S. 630, at 636, this Court stated:

"Those findings, being concurrent findings of the two lower courts, will be accepted here without re-examination of the evidence."

The ugly charge of racial discrimination indulged in by petitioners has thus been established by the District Court and the Court of Appeals to have no basis in fact. Hence, the issue of racial discrimination is not, we would suppose, a part of the case before this Court.

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[2] Among the petitioners in the instant suit, those employed on the Central of Georgia Railway, being represented by the same counsel that represent petitioners in the instant suit, instituted a contempt proceeding on December 18, 1957, against the Brotherhood and the Central of Georgia Railway before the United States District Court for the Middle District of Georgia. The proceeding charged the Brotherhood and the carrier with the first, third, and fourth types of discriminatory practices charged in the instant suit. A trial was had and the District Court's findings, in the form of an opinion, are reproduced in the Appendix to this brief for the convenience of this Court.

ARGUMENT

We wish to make plain, at the risk of being repetitious, what this case does *not* involve. It does not involve a question regarding the validity or applicability of any collective bargaining agreements allegedly made on a racially discriminatory basis. Petitioners have sought from the initiation of these proceedings in the District Court to the present time to make this case appear as one predicated upon racial discrimination in representation in order to evoke the sympathy and restraint prompted by such issues.

But both courts below found all the facts pertaining to such contentions against petitioners. The opinion below makes this abundantly clear:

> "Although these proceedings have been punctuated by accusations of racial discrimination, it would seem that we are really concerned only with ascertaining the rights of any person who, for any reason, finds himself in a minority or outvoted status, the issue of actual discrimination by the Brotherhood having been subtracted from the issue by the findings of the district judge, as hereinbefore stated." (App. to Pet. for Cert., p. 28.)

The issue is thus reduced to the narrow, technical question of whether, when a collective bargaining representative, duly designated and authorized to represent employees under the Railway Labor Act, is an unincorporated association, such association must admit to membership all employees in the craft it represents, and may not exclude an employee from membership because of his race.

1. There is no requirement in the statutory or common law imposing such condition or prohibition on an unincorporated association. Clearly, there is no provision of the Federal Constitution that imposes any such requirement or prohibition on respondent. The first ten amend-

ments are directed to governmental action, not to that of unincorporated associations. *Corrigan v. Buckley*, 271 U. S. 323.

Petitioners attempt to raise a Fifth Amendment question in rather vague language, in which they refer to "equal representation which the Constitution guarantees to all persons regardless of race" (Pet., 9-10), "rights without which the bargained conditions of employment are constitutionally tainted" (Pet., 13), and "the possibility of election to officership" which they say "is in itself a right not to be lightly discounted." (Pet., 14.)

There is no question in this case of petitioners being denied an equal voice in the determination of who shall be the collective bargaining representative. The Railway Labor Act gives them that right. But they want to go further. The Brotherhood being the choice of the majority, they want an equal voice in the election of Brotherhood officials and they want to participate in the alleged collective bargaining councils of the Brotherhood. (Pet., 8-10.)

Petitioners' "thumb on the scales" argument (Pet., 17-21) far overshoots the mark. They would convert the Brotherhood into an agency or department of the Federal Government, by reason of its having been selected as collective bargaining representative, bound by all of the requirements and limitations imposed by the Constitution on the Federal Government. That such is not the situation is perhaps best illustrated by the proposition that while, almost certainly, Congress could not constitutionally establish rates of pay for locomotive firemen, there is no question but that the Brotherhood and the railroads can lawfully establish, by agreement, the firemen's pay scale, as they have done. And if the "thumb on the scales" has the consequences suggested by petitioners, then it would

seem that every business man, farmer, and veteran who receives help from the government would also be required by the Constitution to operate his business, farm, and home without racial discrimination and subject to all the other restrictions imposed on the Federal Government. Most of such results may be socially desirable to some part of society, but it cannot seriously be thought that they are constitutionally required.

Nor is there any statutory requirement that the Brotherhood admit petitioners to membership. This argument of petitioners (Pet., 15-16) is simply a play on words. They say they are denied the right to vote for Brotherhood officials, while the Railway Labor Act gives a craft the right to bargain "through representatives of their own choosing," and the actual negotiations are conducted by officials. Assuming that to be true, there can be no question that the "representative" in the statutory sense is the Brotherhood, not any particular official at any level. Petitioners have always been entitled to full and equal rights in determining who the bargaining representative in the statutory sense shall be.

The Act defines "representative" as "any person or persons, labor union, organization, or corporation designated * * *" 45 U. S. C. Sec. 151, Sixth. Petitioners' statutory argument would give them the right, in the event a corporation were designated, to vote for officers and directors of the corporation.

This Court has expressly recognized that there is no limitation in the Railway Labor Act on the right of a collective bargaining representative to restrict its membership on any basis. In *Steele v. L. & N. R. Co.*, 323 U. S. 192, at 204, the Court said:

> "While the statute does not deny to such a bargaining labor organization the right to determine

eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."

And that conclusion of this Court has been confirmed by Congress. In 1950, when the union-shop amendment to the Railway Labor Act was under consideration by the Senate, an amendment was introduced which would have prohibited organizations having racial restrictions on membership from acting as collective bargaining representatives. The amendment failed of enactment.[3]

2. The final argument of petitioners for the granting of the writ—that it should be granted as a vehicle for reversing the decisions below, not because they are wrong or because respondent is acting unlawfully but because it would promote racial integration in the public schools and other public facilities—is not an appeal to legal principles.

3. The concurring decisions and opinions of the District Court and Court of Appeals are so clearly correct that the petition raises no substantial legal question to be considered by this Court.

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[3] Pp. 16536, 16537, 17241, Congressional Record, 81st Congress, 2nd Session.

A similar amendment to the union shop bill was urged by the general counsel for The International Association of Railway Employees, a Negro labor organization, when he appeared before the House Committee on Interstate and Foreign Commerce during hearings on H. R. [illegible]. See p. 294, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-First Congress, Second Session.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari does not fulfill those conditions specified in Rule 19 of this Court which justify the granting of a writ.

Respectfully submitted,

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January 3, 1959.

APPENDIX.

OPINION OF DISTRICT COURT IN WASHINGTON, ET AL. v. CENTRAL OF GEORGIA RAILWAY, ET AL.

Civil Action No. 711.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA,
MACON DIVISION.

CURTIS H. WASHINGTON, *et al.*,

Plaintiffs,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *et al.*,

Defendants.

BOOTLE, *District Judge*:

The above action was instituted in this Court on December 12th, 1949, by a number of Negro firemen on the Central of Georgia Railway Company to strike down racial discrimination then practiced under the Southeastern Carriers' Conference Agreement of February 18th, 1941, limiting Negro firemen, euphemistically referred to therein as non-promotable firemen, to 50% in each class of service. The action accomplished its purpose in that on March 25th, 1952, Judge A. B. Conger signed a consent decree permanently enjoining all defendants, including the Central and the Brotherhood of Locomotive Firemen and Enginemen:

> "(a) from enforcing the Southeastern Carriers' Conference Agreement of February 18, 1941, or any other written or oral agreements, or carrying on any practices under such agreements, insofar as said agreements or practices discriminate, on the ground

of their race or color, against Negro firemen in their employment or occupation as firemen on steam locomotives or as helpers on Diesel locomotives, or (b) from denying to plaintiffs or other members of their class their respective rights to assignments as firemen on steam locomotives or as helpers on diesel locomotives based upon seniority and qualifications because they are Negroes or because they have not been permitted or required to take or pass examinations to qualify as engineers. * * *"

On December 18, 1957, Al Marshall, Major Simpson, Will Covington, Jim Mullins and Marion Vincent, five Negro firemen employed by the Central, filed their motion to intervene in said case and to be permitted to file their petition against the Central and the Brotherhood for a rule to show cause why they should not be held in civil contempt for certain alleged violations of said injunction. The intervention was allowed, the petition filed and rule to show cause issued.

The interveners have made the following showing. Their employment by Central antedates the injunction and they are entitled to the benefits thereof. The Brotherhood is their exclusive bargaining representative with the Central under the Railway Labor Act. They are excluded from membership in the Brotherhood because of their color. Due to the long standing rule applicable on the Central that engineers must have experience as firemen and that Negroes may not become engineers, Negro firemen have become the senior firemen having the right to choice runs and all other rights accompanying high seniority. One of the choice runs on the Central is the freight run from Columbus, Georgia to Birmingham, Alabama on the Columbus Division. For 20 years or more prior to March, 1957, this run was worked for the most part by five Negro firemen with top seniority who shared its mileage.

As of the time of the filing of this intervention these runs were held by the five interveners and their mileage averaged about 3760 miles in a 30 day month and 3610 miles in a 31 day month, the smaller mileage in the longer month being due to the men's being "held off" so as not to exceed the maximum of 3800 miles per month, as prescribed in the Schedule of Wages, Rules and Regulations hereinafter mentioned.

On or about March 1, 1957, pursuant to an agreement between the Brotherhood and the Central a "swing man" was added to this regular assigned run. He takes the fifth run of each man four times a month causing each of the five men to lose mileage and pay. Since the swing man has been added each of these five regular assigned jobs lose 628 miles per month representing a loss of pay of something like $100.00 per month for each man. Intervener Marshall testified that it reduced his monthly pay from approximately $650.00 to approximately $580.00.

Upon the basic facts above found the parties rest radically diverse contentions. Interveners say that in adding this swing man and in thus taking mileage and pay from them, the Brotherhood and the Central have flagrantly violated the injunctive decree of this Court in that they have thus been "enforcing * * * written or oral agreements [and] carrying on * * * practices [which] discriminate, on the ground of their race or color, against Negro firemen in their employment or occupation as firemen on steam locomotives or as helpers on diesel locomotives * * *."

The Central and the Brotherhood, on the other hand, emphatically deny both the alleged intent to discriminate and the alleged fact of discrimination.

Interveners' counsel succinctly outlined their contentions as follows: "We do not contend * * * that these outstanding Federal decrees [similar decrees were issued in

other Courts] prevent any reduction in the pay and privileges of Negro firemen of any kind. Any reduction which is made equally across the board, affecting all, certainly is not a discrimination against Negro firemen. We do not claim that the injunctions have insulated these men in a position where they can come to a federal court and resist any type of reduction in their pay or mileage. That is certainly not what was intended, but we say that discriminatory reduction where we can show that the Negroes have been selected for the application of an adverse rule such as this one and that whites are not similarly subjected, that, we say, of course, is the exact discrimination which the very terms of the consent decree prohibit. * * * I have thought about just what discrimination means, and what it takes to prove it, and I think what I mean in this case by discrimination is the selective—the racially selective application of reduction in job rights. That is what I mean, and I think that is what we intend to prove; the curtailments in the privileges and payments of jobs effected against Negroes but not against whites basically, and I think that is the kind of discrimination covered and the kind we will show has been effected in this case."

Interveners claim the existence of certain matters "in aggravation of this discriminatory reduction in their mileage," namely, that (1) they were "frozen" in these reduced mileage jobs and denied their contractual right to shift to another job; (2) this inroad upon their seniority privileges and pay and mileage was totally racially selective in the sense that no comparable reduction of the pay of white firemen was made on the Columbus division or other divisions of the Central; (3) their pay loss necessarily goes to white firemen and (4) a system of discrimination has been built into the railroad industry in that only white firemen were promotable to jobs as engineers; that thus an

engineer, always a white man, may have seniority as a fireman, engineer, hostler and hostler helper, whereas a Negro fireman has seniority only as a fireman and that consequently a demoted engineer who is "back firing," in competition with interveners, has the possibility of supplementing his pay as a fireman with pay earned in another capacity, whereas such possibility is not open to interveners.

Counsel for the Brotherhood, after denying discrimination and discriminatory intent, deny also that interveners have a right to run a greater mileage per month than other firemen generally run and deny that adjusting their mileage to bring them in line with mileage run by other firemen constituted hostile discrimination in any legal sense of the word. The Brotherhood says further that this swing man was added in keeping with the Brotherhood's policy nationally and locally to spread the work among all employees for whom it acts as bargaining agent, and that this policy has been, and is being, applied discriminately not only to the Columbus division but to all divisions and districts of the Central and not only to Negro firemen but to white firemen as well.

The Central's position is that prior to March 1, 1957, Article 26, Section 2(a) and (f) of the Schedule of Wages, Rules and Regulations governing locomotive firemen read as follows:

"SENIORITY, MILEAGE AND PROMOTION.

"Section 2. REDUCTION OF FIREMEN'S WORKING LISTS: When from any cause it becomes necessary to reduce the number of firemen on the firemen's working lists on any seniority districts, the following rules will apply:

"(a) No reductions will be made so long as those in assigned or extra passenger service are averaging

the equivalent of 4,000 miles per month; in pooled, chain-gang freight or any other assigned service, paying freight rates are averaging the equivalent of 3,200 miles per month; on the road extra lists are averaging the equivalent of 3,200 miles per month; or those on the yard extra lists are averaging the equivalent of 32 days per month.

* * * * *

"(f) In the regulation of assigned or extra passenger service, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in assigned, pooled, chain-gang or any other service paying freight rates, a sufficient number of firemen will be assigned to keep the mileage or the equivalent thereof within the limitations of 3,200 and 3,800 miles per month. Neither the maximum nor the minimum is guaranteed.";

that due in part to dieselization, there has been a reduction in need for firemen and engineers, and by reason of this reduced need and in an effort to distribute the available work among as many as possible of the employees, both Negro and white, the Brotherhood petitioned the Central in accordance with the Railway Labor Act for a revision of the Article and Section above quoted so as to reduce from a minimum of 3,200 to a minimum of 3,000 the number of miles a fireman, be he white or Negro, in freight or any other assigned service paying freight rates would be entitled to make per month before there could be a reduction by the Central in the "firemen's working lists," that is a roster from which men for trains are taken according to seniority and entirely without regard to race; the Central, in good faith, consented to said request and, accordingly, Article 26, Section 2(a) and (f) was re-written, changing in Section 2(a) the figure

4,000 to 3,800, the figure 3,200 to 3,000 and in the last line thereof "32 days" to "26 days," and changing in Section 2(f) the figure 4,000 to 3,800 and the figure 3,200 to 3,000, this agreement having been entered into on February 21, 1957, to become effective March 1, 1957; under the amended agreement it was possible to add a swing man on the Columbus to Birmingham freight run without violating the new minimum of 3,000 miles per month; the addition of this swing man was also provided for in Section 2(h) of Article 26, which reads:

> "(h) To keep within the mileage regulations set forth in this section, additional crews may be added or swing men used to relieve the regular men on specified days. If regulation cannot be made as provided herein, men will be required to lay off so that the equivalent of 4,800 miles in passenger service, or 3,800 miles in other assigned service, will not be exceeded.";

the sixth, or swing man's, job was bulletined in accordance with the contract between the Central and the Brotherhood and has been filled strictly according to seniority and entirely without regard to an employee's race; and insofar as the Central is concerned the amended Article 26, Section 2(a) and (f) has been applied uniformly to all firemen, both white and Negro, wholly without discrimination against any employee or group of employees.

At the conclusion of the evidence, the Central moved to be dismissed as a party defendant upon the ground that there was no evidence tending to show any discriminatory acts by it. Interveners expressly consented that said motion be granted while the Brotherhood took no position with regard to said motion. Thereupon, the Court entered an order exonerating the Central with regard to the contempt charges, but retaining it as a party

defendant so that it would be subject to such further order or orders as may be entered in the case.

Under the law, the burden is on the moving party to show the facts necessary to establish contempt. This burden must be carried by clear and convincing evidence. While proof beyond a reasonable doubt is not required, the authorities sometimes say that more than preponderance of proof is required. "Whatever qualifying adjective may be used in the various opinions, they are unanimous that a heavy burden of proof rests upon the party urging contempt." *Kansas City Power & Light Co. v. National L. R. Board,* 137 F. 2d 77, 79 (8th Cir. 1943); 15 *Cyc. Fed. Pro.* Sec. 87.87 (3d ed. 1953). Added to the burden above outlined which is applicable to all contempt cases, interveners have the burden here of showing not only discrimination, but discrimination "on the ground of their race or color," such being the terms of the decree.

After a careful consideration of all of the interveners' contentions and all evidence adduced, this Court is convinced that no discrimination, and hence no contempt, has been shown. I find that the Brotherhood, in good faith both nationally and locally, adopted a policy of distributing the work among firemen represented by it as bargaining agent. This policy has been, and is being, applied not only on the Central but on other railroads. It is not a surprising policy in view of the reduced need for firemen. One diesel engine pulls longer trains than the old steam locomotive engine and one fireman, or helper on diesel locomotives as he is now called, with one engineer operates multiple diesel units. On the Central, this policy has been, and is being, applied not only to interveners but to any and all firemen to whom mileage conditions render it applicable, and it is applied not only on the Columbus division, but on all divisions and dis-

tricts where circumstances permit. The Central has three divisions, Savannah, Macon and Columbus, the Savannah division having only one district, namely, the Savannah district; the Macon Division having two districts, namely, the Atlanta and the Southwestern and the Columbus division having two districts, namely, the Columbus district and the Cedartown district. No racial discrimination was involved in adding this swing man. This additional job was not created for a white man. Interveners allege in Exhibit B, the affidavit of Al Marshall attached to their petition, that the swing job was held by R. B. Gable, a white man, who, although junior in seniority to Negro firemen from whom he takes mileage, is permitted to make mileage and pay equal to and greater than the mileage and pay of the senior Negro firemen from whom he takes his mileage. I find, however, that this job was, in accordance with the applicable agreement between the Central and the Brotherhood, regularly bulletined for the first five days in March, 1957 and was available to the highest seniority bidder who turned out to be Will Covington, one of the five interveners. He bid this job in on March 6, 1957, and held the run until March 31, 1957. The white man, Gable, may have held the run from the extra board during the first five days of March while it was being bulletined. Later, he was swing man from April 18 to May 31, August 29 to September 8, and December 1 to December 17. It is true, therefore, that this swing job, like all other firing jobs on Central, was open to the highest bidder regardless of race or color and there is considerable turnover in some of these jobs according to the bidding.

The use of a swing man on the Central is not new. As above shown, swing men are provided for by Section 2(h) of Article 26, of the Schedule of Wages, Rules and

Regulations. Mr. W. M. Ector, the Central's superintendent on the Columbus division, found a swing man in passenger train service when he came to Columbus in 1953. Three passenger trains were being operated to Birmingham and the five firemen assigned to these trains were four colored and one white. Four passenger trains were being operated to Atlanta and the three firemen assigned to them were two colored and one white. In March, 1953, a white man was put on these runs as a swing man, swinging on both the Birmingham run and the Atlanta run and taking mileage from both Negro and white firemen and making a little more than the regular firemen. There is a swing man on the Savannah division now having been there approximately five years, although no swing men have been added in that division in the last three years. William E. Mitchell, Vice-President of the Brotherhood, testified that swing men are used throughout the country as a general practice and related an instance in 1953 on the Atlantic Coast Line in Georgia where white firemen, members of the Brotherhood, were challenging its authority to add a man to an assigned run thereby bringing the mileage to these men below the minimum prescribed by the rules. The man was added, the mileage reduced and this action was affirmed through all the appellate procedure of the Brotherhood.

The fact that the minimum monthly mileage was reduced from 3,200 to 3,000 has made it possible to keep men in pools who would otherwise have been removed, thus saving jobs, and has made it possible to add men to pools and on extra boards, thus creating more jobs. Five specific instances were disclosed. (1) During the first half of May, 1957, in the Southwestern district of the Macon division there were in a freight service pool three white and two colored firemen making a total 15 day mileage of

9,366 or 1,873 miles per man. The reduced mileage agreement permitted the addition of a sixth man for the second half of the month when the total mileage was 10,286. The effect of adding the sixth man was to take away from each of the three white and two colored firemen 343 miles for the month. (2) For the first half of September, 1957 in the Southwestern district of the Macon division there were in pool freight service five white and one Negro firemen each making for said half month a mileage of 1500. Had it not been for the reduced mileage agreement a man would have been taken from the pool. During the second half of the month the six men made 1,488 miles each. If, during the second half there had been only five men in the pool the average for said half would have been 1,786 miles. Thus, but for the reduced mileage agreement, five of these men would have earned 298 miles more than they did. (3) On an extra board in the Atlanta district of the Macon division for the second half of April, 1957, because of the new rule and the addition of a sixth man five white firemen lost 373 miles per man. (4) On an extra board in the Columbus division Cedartown district because of the new rule three white firemen lost 773 miles each for the second half of August, 1957. (5) On March 16, 1957, a man was added to the extra board on the Savannah division, this being made possible by the reduced mileage agreement.

Coming now to the four instances claimed as aggravation of the alleged discrimination, while it might suffice to say that there can be no aggravation of discrimination in the absence of discrimination, an analysis of these claims is to be preferred.

Intervenors' claim that they were frozen in these reduced mileage jobs and thereby denied their contractual right to shift to others would be serious, if substantiated.

Certainly, if these men were, because of their race, denied the right to assert their firing seniority with respect to any job open to white men because of firing seniority, they would be entitled to quick and certain relief. Notwithstanding the fact that this claim was not mentioned by interveners in their pleadings, the Court, nevertheless, ruled at the trial that they were entitled to show the overall picture of what was being done, the consequences of it, the background, the setting and how it all operated. This particular claim is based upon interveners' interpretation of Section 6(d) of the Schedule of Wages, Rules and Regulations and particularly upon that portion herein italicized, which section reads as follows:

> "(d) Changes of time tables, of schedules, and of rates of pay do not constitute changes in working conditions that will warrant runs to be bulletined. *Runs will be bulletined when miles are added to or taken from the run,* or where the terminal or lay-over of such runs are changed. This is to apply to all men in engine service, except on local freight schedules which are changed three hours or more." (Emphasis supplied.)

Admittedly, interveners' runs as distinguished from the new swing run were not bulletined and interveners point out, therefore, that they were not permitted to roll a junior fireman off his job, but would have to remain on their old jobs until some other job was advertised at which time concededly they could bid. At most, therefore, this is a claim of a temporary freeze. Apparently, this claim is not taken or asserted too seriously by interveners. Not only was it not mentioned in their pleadings, but their counsel, in outlining their contentions to the Court, said with reference to this claim: "And, as I said before, this is not material to the case but aggravates what happened to these

men, in that it reduced their mileage and actually froze them into that reduced mileage. But it is not that against which we seek relief, but against the reduction in mileage." While intervener Marshall testified that if his job had been bulletined there were two other jobs he could have got, I find that one of these jobs was bulletined subsequent to March, 1957 and that he did not take it then because he preferred to stay where he was. When he was asked whether, if the other one had been bulletined he would have changed his mind about it as he did about the one which was bulletined, he stated: "Maybe I could have; I don't know." This particular contention presents, at most, a question of interpretation of Section 6(d). Interveners claim that under this section their jobs should have been bulletined. The Brotherhood contends, on the other hand, that when a swing man is added only the swing man's job should be bulletined. The Brotherhood's position is that the language of the rule "runs will be bulletined when miles are added to or taken from the run" relates to the run itself and not to the man, and that if the run is lessened, for instance where the terminal is changed, the run will be bulletined, whereas, if the runs remain the same they are not to be bulletined even though a swing man is added thereby causing the firemen to earn less from their runs. The General Chairman of the General Committee of the Brotherhood, who has held that position since June 1, 1953 and who has been employed by the Central for approximately 15 years, testified that such has been the interpretation of this section ever since he has known about it. There is no contention that this section has ever been applied in this type situation other than in the same manner it was applied here. Therefore, no discriminatory application of this section has been shown.

The claim that no comparable reduction in the pay of white firemen was made has been fully covered.

Interveners' claims by way of aggravation that their pay loss necessarily goes to white firemen and that a Negro fireman cannot supplement his earnings while a white fireman holding seniority in other lines of work may do so both stem from the railroad and Brotherhood discrimination against Negro firemen by denying to them the right to be promoted to engineers' jobs. Interveners' counsel, himself, answered these contentions in his opening statement when, in reply to the Court's inquiry: "That is because one is promotable and one is not?" said:

> "That aggravation results from that fact, that's right. But we, of course, do not seek any relief with respect to that. It is one that has been built in by virtue of the discrimination practiced for 50 years and there is no longer any solution to that, so we do not seek any redress against it. We merely point it out to illustrate that this new reduction in the mileage has caused a more aggravated situation to arise."

Of course, it is only partially true that interveners' pay loss goes to white firemen. Immediately, their pay loss, as has been demonstrated, goes to the swing man, who most generally is a Negro because of the Negroes' high seniority as firemen. It may go, more or less temporarily, to a demoted engineer who claims a firing assignment until he can return to duty as an engineer. To the extent that the addition of the swing man creates one more firing job in the overall firing picture for the benefit of a junior fireman way down on the list, this pay loss does benefit a white junior fireman. This is necessarily so because under the old 50% rule, stricken down by the injunction in this case, over a long period only white firemen were added as employees and so many were added

that during the last fifteen years no new firemen, white or colored, have been employed in the Columbus division. The identity of firemen at the bottom of the seniority list, therefore, results from discrimination which antedated the injunction and which the injunction did not undertake to correct except for the future. With respect to these contentions, therefore, the respondents cannot be adjudged in contempt for failing to do more than the injunction required.

In the case of *Oliphant v. Brotherhood of Locomotive Fire. & Eng.*, 156 F. Supp. 89, 90 (N. D. Ohio, 1957), the main object of which is to compel the Brotherhood to admit Negro firemen to membership, certain acts of discrimination were alleged including the addition of this swing man involved in this case, and Al Marshall, one of the interveners here, testified there covering this common feature or aspect of the two cases. In the opinion in that case, Chief Judge Jones wrote:

> "It is the plaintiffs' position that the Brotherhood has never represented the Negro workers on equal terms with the white workers, that the United States Supreme Court in Steele v. Louisville and Nashville R. R., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, recognized at least one instance of this unequal treatment and ordered the Brotherhood to cease this discrimination, and that the Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the 'gouge' rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70. For reasons which shall appear later, these alleged acts of

discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against the Negroes."

Collective bargaining contracts and arrangements worked out in good faith between the statutory representative of a craft and the employer are not vitiated merely because they "may have unfavorable effects on some of the members of the craft represented." *Steele v. Louisville and Nashville R.R. Co.*, 323 U. S. 192, 203, 89 L. Ed. 173, 183 (1944). See also *Ford Motor Co. v. Huffman*, 345 U. S. 330, 97 L. Ed. 1048; *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U. S. 521, 93 L. Ed. 1513.

Let counsel for respondents prepare a judgment in accordance herewith and submit the same to counsel for interveners who shall have five days for suggestions as to form.

This 27th day of June, 1958.

/s/ W. A. Bootle,
United States District Judge.

(Emphasis ours.)

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No. 560

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents

REPLY MEMORANDUM FOR PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 560

LEE OLIPHANT ET AL.,

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Respondents

REPLY MEMORANDUM FOR PETITIONERS

(i) The "Brief of Respondents in Opposition" does not challenge the basic premise of the Petition for Certiorari that the legality of the exclusion of Negroes from their collective bargaining agent under the Railway Labor Act is an important federal question calling for this Court's review. Nor do respondents attempt in any way to answer petitioners' contention that the holding of the court below disregards the applicable decisions of this Court concerning the private exercise of governmental and governmentally derived responsibilities. Thus, for example, the Court will search the Opposition in vain for any distinction of, or even any reference to, its decision in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, where this Court ruled unequivocally that "bargaining agents who

enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." Certainly, as petitioners have repeatedly pointed out throughout this litigation without even an attempted contradiction by respondents in the courts below or in their Opposition here, if a statutory bargaining representative is held to standards of fairness in its action towards those it does not legally represent, it cannot be subject to less stringent standards in its exercise, for those whom it does represent, of the federally-derived statutory power itself.

(ii) Instead of meeting petitioners' assertion that the holding of the court below, which sanctions exclusion of Negroes from their bargaining agent under the Railway Labor Act, raises important federal questions and conflicts with applicable decisions of this Court, the respondents have simply presented argument upon the merits of the case by challenging the *Steele* doctrine. Actually, as this Court is fully aware, the Brotherhood has never accepted, and does not today accept, the *Steele* doctrine as the law of the land. See *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232. On page 2 of their Opposition, the respondents state that "the Railway Labor Act has had no more than a metaphysical influence" on collective bargaining and "merely forbids an individual employee or a minority group within a craft from doing something which they never had the power or the desire to do previously" (p. 3). Obviously, if the Railway Labor Act has had no more than a "metaphysical influence", there would have been no warrant for the *Steele* decision holding the collective bargaining agent under the Railway Labor Act to the standards of fair play required of legislative bodies. Similarly, in challenging petitioners' "thumb on the scales" argument (p. 11), respondents would overrule the

entire line of cases in this Court holding private agencies exercising governmentally derived responsibilities to minimum standards of fair conduct. No one suggests that the Brotherhood should be converted "into an agency or department of the Federal Government" (Opposition, p. 11). But, under *Steele, Howard* and other decisions of this Court, there is a sufficient exercise of governmentally derived authority by the Brotherhood to require, at the very least, that it grant Negroes that union membership which is a prerequisite of participation in the selection of their bargaining officials and in the formulation of bargaining objectives.[1]

(iii) Since this case presents to the Court a serious constitutional issue under the Fifth Amendment, petitioners have suggested that the Court may first want to consider an interpretation of the Railway Labor Act which would indicate that Congress had not authorized racial exclusion from the statutory bargaining agent. Respondents seek to ridicule this argument because the Railway Labor Act does not contain language requiring admission of Negroes to membership and because an amendment to accomplish this result failed of enactment (Opposition, p. 12-13). The tenuous nature of interpretation on the basis of the failure of an amendment is well illustrated in this case (see Petition, p. 16). At any rate, whether the issue to be adjudicated is constitutional or one of interpreting the Railway Labor Act can be determined by the Court after it considers the full facts, as it did in *Steele* and similar cases.

(iv) Respondents also dwell at length upon the question whether the Brotherhood discriminates against Negroes

[1] Respondents' suggestion that petitioners are contending that the Brotherhood must "open the doors of membership to all persons within the craft" (p. 5) is totally unwarranted. Petitioners contend only that exclusion cannot be based on racial grounds which this Court found "invidious" in *Steele*.

not only by depriving them of participation in the bargaining process but also by the working conditions actually bargained. Although this was not a necessary part of petitioners' case, petitioners did present to the District Court evidence of continuing discriminations by the Brotherhood in its bargaining of working conditions and in its day-to-day handling of grievances, assignments of jobs and working privileges (see Petition, pp. 5-6). Petitioners' proof of continuing discriminations was accepted by the District Court (J.A. 300) which held that "*there is no question that the evidence presented establishes that fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their conditions of employment, and other matters relating to such employment.*" It is true that the District Court could not "state definitely" that certain major bargaining changes recently negotiated by the Brotherhood to the disadvantage of Negro firemen were adopted "for the purpose of discrimination" (J.A. 299), and the Court of Appeals agreed. But other discriminations amply documented in the record and accepted by the District Court, do serve to demonstrate the applicability of this Court's statement in *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 94, that denial of "any part in the determination of labor policies to be promoted and adoped in the industry" may deprive racial minorities of "all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees . . . "[2] This Court will certainly want to consider that petitioners are not only denied

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[2] Respondents have printed as an appendix to their brief a case in the District Court for the Middle District of Georgia in which members of petitioners' class have sought to prove that they were recently discriminated against in violation of an outstanding injunction resulting from *Steele*, *Tunstall* and *Graham*. What the Brotherhood failed to mention was that this case is presently on appeal to the Fifth Circuit on the ground that the admitted taking of the mileage and pay of the Negro

all voice in the determination of their working conditions by their exclusive statutory representative, but that, without internal political voice and power, they continue to be subjected to discriminatory and self-serving "representation" by the Brotherhood.

Conclusion

We cannot believe that this Court will leave standing a federal appellate ruling that Negro workers can be denied admission to the union which, by virtue of federal law, exclusively represents them in the determination of the most vital aspects of their daily life. Racial denial of voice and vote in the selection of statutory bargaining officials is deprivation of economic democracy no less crying for redress than deprivation of political democracy through racial denial of the right to vote for public officials.

The Opposition having failed in any way to meet petitioners' contentions of importance and conflict with the rulings of this Court, it is respectfully submitted that the Court grant certiorari to determine the vital issues here involved and that it set the case for argument at this term of Court.

Respectfully submitted,

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JANUARY, 1959.

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firemen involved was in fact discriminatory. Actually, what the case demonstrates is the limited value and availability of judicial relief against discrimination which Negro firemen should be able to prevent by the exercise of political power within the union itself.

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No. 360

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents.

PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 560

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents

PETITION FOR REHEARING

Petitioners, Negro locomotive firemen, on their own behalf and as representatives of the class of Negro locomotive firemen, respectfully move for a rehearing of the denial of certiorari entered March 9, 1959.

Counsel are not unmindful of the careful consideration which this Court gives to petitions for certiorari and this is no doubt especially true of the instant petition which was *sub judice* for a substantial period of time. But counsel are induced to file this petition for rehearing because the Court's stated reason for denial of certiorari—"the abstract context in which the questions sought to be raised are presented by this record"—indicates both an acceptance by the Court of the importance of the questions

raised and a grave misapprehension by the Court as to the nature of the record presenting those questions.[1]

As we shall demonstrate in Point I of this Petition for Rehearing, the record, far from presenting in an "abstract context" the admittedly important questions concerning racial exclusion from the statutory bargaining agent, actually provides a most concrete, specific and detailed basis for decision in as bitterly contested a litigation as has come before this Court in recent years. *Cf. Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232. Indeed, so concrete, specific and detailed is the record before this Court that the only likely explanation of the Court's use of the words "abstract context" is a misunderstanding of the record created by the confusion in the opinion below. Since the matter was before this Court on petition for certiorari and the Court thus did not have the benefit of briefs and argument on the merits analyzing the record, the Court undoubtedly relied heavily upon the decision below for its understanding of the nature of the record and may well have assumed that the confusion in that opinion reflected a confusion (and thus an "abstract context" for the questions presented) in the record itself. But, as we demonstrate in Point II of this Petition, nothing in the decision below can

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[1] Since this petition for rehearing is predicated primarily upon what we believe to be a misapprehension concerning the record revealed in this Court's announced ground for denying certiorari, this petition is obviously confined to "intervening circumstances of substantial or controlling effect" within the meaning of Rule 58, paragraph 2. The correction of a misapprehension, revealed by the Court in its announced ground for denial of review, has on a number of occasions led this Court on rehearing to grant certiorari previously denied. See, e.g., *Brady* v. *Terminal R.R. Ass'n.*, 302 U.S. 678, 688; *Bakery & Pastry Drivers* v. *Wohl*, 315 U.S. 769, 773; *Cafeteria Employees Union* v. *Angelos*, 319 U.S. 753, 778.

or does impair the concrete context in which the record presents the vital pending questions.

We urge the Court, despite the careful consideration which it has undoubtedly already given to this case, to consider it anew in the light of the analysis of the record and of the opinions below which we present in this petition.[2] This is the last round for petitioners and their class. The Southern railroads have not hired Negro firemen for many years (J.A. 72, 85, 164); and thus the hundreds of Negro firemen involved in this case as petitioners and as a class are elderly men; their overriding wish is to live out their working lives as first class citizens. The reason given by this Court for the denial of certiorari, although it has been widely considered to indicate this Court's doubts concerning the decision below, does not render that decision any less *res judicata* against the class of Negro firemen. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356.[3] The door to

[2] In the petition for certiorari, petitioners pointed out that "proof that the working conditions bargained are themselves actually discriminatory is not a necessary part of petitioners' case, but petitioners will, if certiorari is granted, demonstrate on this record the extent to which exclusion from the statutory bargaining agent necessarily results in, and did here result in, actual discrimination against them" (Petition, n. 12, p. 13). Since no suggestion had previously been made in this litigation that the statutory and constitutional questions were being presented in an abstract context, there was no occasion to present to this Court in the petition for certiorari an analysis of the state of the record or of the effect of the opinions below on the state of the record.

[3] Since this Court has made it abundantly clear that the denial of certiorari is not in any way to be deemed an approval of the decision below (*United States* v. *Carver*, 260 U.S. 482, 490), there appears to be some justification for the general view that the Court's indication here of a non-jurisdictional reason for its denial of certiorari indicates something more than the ordinary "nonapproval" implicit in an unexplained denial of certiorari. Although this indication of the Court's doubts concerning the decision below may conceivably be of assistance to the many other groups of Negroes barred from their statutory bargaining agent who may at some future time see fit to assert their rights, it will be of no assistance to the expiring group of Negro firemen who have sacrificed so

first class citizenship is closed forever to these men after more than four-years of litigation and of expense and after decades of discrimination constituting one of the darkest chapters in the history of the American labor movement (see, e.g., Northrop, *Organized Labor and the Negro*, pp. 48-71 (1944)). Only one last consideration by this Court can write a just and final chapter to one of the most unjust discriminations of our time.

I

The Record Presents the Issue of Racial Exclusion from the Statutory Bargaining Agent in a Concrete Not an Abstract Context

From the outset of the case, petitioners leveled a two-pronged attack (see J.A. 16-17, 300-301) upon their exclusion from the Brotherhood—first, that their exclusion from membership renders them *inherently unequal* in the statutory bargaining process, and second, that they are entitled to admission because as a matter of fact they are receiving *actually unequal* representation from the Brotherhood. As a concrete foundation and base for the first theory of *inherent inequality*, petitioners sought from the outset to demonstrate how their exclusion from membership results in their complete exclusion from any voice, vote or other participation in the bargaining process. In support of the second theory of *actual discrimination*, petitioners sought from the outset to demonstrate the Brotherhood's hostility, nonrepresentation and misrepresentation, all to provide the most concrete possible context

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much to vindicate their constitutional and statutory rights. Furthermore, as we point out later (see n. 9, p. 20, *infra*), the uncertainty flowing from the Court's use of the words "abstract context" may actually place additional hazards in the way of those seeking to raise issues of racial exclusion and racial segregation, contrary, we believe, to this Court's intention.

in illumination of the very real and immediate need for membership and participation in their statutory bargaining representative.[4]

Petitioners filed a lengthy complaint detailing their complete exclusion from any voice, vote or other participation in the bargaining process and the various types of nonrepresentation and misrepresentation of their interests to which they are subjected by the Brotherhood (J.A. 5-19). Prior to the trial, petitioners obtained various admissions and answers to interrogatories from the Brotherhood, particularly with respect to their exclusion from the Brotherhood, its meetings, its elections, its bargaining deliberations and even its information (J.A. 30-39). At the trial itself, which consumed an entire week in the District Court, eight witnesses appeared for petitioners to testify from personal experience to the hostility, nonrepresentation, misrepresentation and discrimination to which Negro firemen are subjected by their statutory "representative" (J.A. 39-167).

By pleading, interrogatory and proof, petitioners provided a concrete context in the three major areas of disadvantage and discrimination to which they are subjected by virtue of their exclusion from the Brotherhood: (a) denial to Negro firemen of all participation in the statutory bargaining process; (b) misrepresen-

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[4] This two-fold approach of course parallels the two-fold judicial approach in the analogous area of racial segregation in public education. Petitioners' first theory—that racial exclusion from the statutory bargaining representative and the statutory bargaining process is inherently a denial of equal protection and equal representation—is analogous to the grounds for this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483. Petitioners' second theory—that the Brotherhood's consistent and unrelenting discriminations against Negro firemen requires admission to equal political power within the union—is analogous to this Court's pre-*Brown* decisions requiring admission where separate was tangibly unequal. *See Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; *Sweatt* v. *Painter*, 339 U.S. 629.

tation and nonrepresentation in the day-to-day interests of Negro firemen; and (c) primary disadvantage suffered by Negro firemen under the Brotherhood's current major bargaining objectives. A brief examination of the record on each of these three major areas of disadvantage and discrimination will, we submit, demonstrate that there is nothing in any way abstract in the "context in which the questions sought to be raised are presented by this record."

A. *Denial to Negro Firemen of Participation in the Statutory Bargaining Process*

Petitioners' complete exclusion from the bargaining process and any voice or vote therein was extracted from the Brotherhood in the course of the litigation. The Brotherhood's President admitted on cross-examination (J.A. 218) that Negro firemen are denied any voice or vote in the election of Brotherhood officials responsible for the bargaining and implementation of the working conditions of all firemen. And the Brotherhood was forced to concede, on written interrogatories, (J.A. 32-33), that Negro firemen may not even attend, much less participate in, the meetings where white Brotherhood members are given "reports on negotiations with carriers" and where firemen discuss "matters of general interest to locomotive firemen," including decisions on "time claims and grievance cases," and "impending changes in assignment of runs, the set up of pools, etc." Indeed, even when the Brotherhood conducts votes among firemen on questions of general importance, such as a change in the work week, Negro firemen are denied the ballot (J.A. 125-128).

The question whether exclusion from membership is inherently a denial of equal protection and equal representation under the Constitution and the Railway Labor Act is thus presented to this Court upon a record of carefully

detailed and admitted facts extracted from the Brotherhood in the course of a prolonged litigation. The record is explicit in demonstrating exactly how exclusion from membership results in exclusion from voice, vote and other participation in the statutory bargaining process. We respectfully submit that the care and detail with which the *inherent inequality* of exclusion has been demonstrated on this record is as far removed from an "abstract context" as night from day.

But petitioners did not rest their case merely on the inherent inequality in the denial of voice, vote and other participation with respect to the formulation and implementation of their conditions of employment; they went on to demonstrate the special need for equal political power within the statutory bargaining representative by virtue of the continuing hostility, nonrepresentation, misrepresentation and discrimination to which Negro firemen are subjected by the Brotherhood:

B. *Misrepresentation and Nonrepresentation in the Day-to-day Interests of Negro Firemen*

The record abounds with unrebutted demonstrations of the hostility, nonrepresentation, misrepresentation and discrimination to which the Brotherhood subjects Negro firemen in their most vital interests:

1. Although practically no new Negro firemen have been hired on any railroad since 1941, when the Brotherhood forced the Southeastern Carriers Conference Agreement on the railroads, its officials refuse even to make representations to the railroads to request renewed hiring of Negro firemen (J.A. 72-73, 84-85). As one Brotherhood official informed a fireman who had asked for help to get a Negro relative hired, " there wouldn't be any more Negro

firemen hired, therefore it was just a matter of time we was out" (J.A. 85).[5]

2. The Brotherhood never informs Negro firemen, nor solicits their views, concerning prospective changes in the governing contract or in its implementation and application; petitioners' witnesses, some of whom have been employed as firemen for thirty or forty years, testified that no Brotherhood official has ever solicited their views with respect to their conditions of employment (J.A. 43-44, 57, 71-72, 75, 85-86, 88-89, 99-100, 105, 109, 126, 132, 137, 142-43, 144).

3. Some Brotherhood officials have even openly declared their policy of discriminating against Negro firemen (J.A. 73-75, 84-5, 86-88, 106-109, 306 *et seq.*). One Brotherhood General Chairman, Thad S. Lee, who initiated a strike vote of the white firemen on the Atlantic Coast Line Railroad because of the railroad's violation of a 1925 "gentlemen's agreement" against hiring of Negro firemen (J.A. 309-316), continues as the highest officer of the Brotherhood on the railroad (J.A. 211-15). Another General Chairman, after Federal Judge Mullins entered a decree in 1951 pursuant to the *Steele* doctrine for the protection of Negro firemen, told one of the petitioners: "Judge Mullins gave it to you but I will sure as hell see you don't keep it" (J.A. 75).

4. Although segregated facilities made available by the railroads to Negro firemen are unequal to those afforded

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[5] There could hardly be a less "abstract" need for equal voice within the statutory representative than the very survival of the class of Negro firemen. Yet, since practically no new Negro firemen have been hired on any railroad for many years (J.A. 72, 85, 164), if petitioners cannot by this Court's mandate obtain political power inside the bargaining representative and thereby obtain renewed hiring of Negro firemen, in the foreseeable future there will be no Negro firemen left to be represented by the Brotherhood either as members or non-members.

white firemen, the Brotherhood has not sought to obtain their equalization (J.A. 56, 89, 129-30).

5. Disregarding the seniority rights of Negro firemen, the Brotherhood has given preferential treatment in the assignment of runs, jobs, etc., to junior white firemen over senior Negroes (J.A. 52-53, 86-88, 100-107, 130-132, 140-142, 149-153).

6. The Brotherhood has refused to take up grievances with the railroads on behalf of Negro firemen, or to represent them on an equal basis with their own members in grievance proceedings[6] (J.A. 52-54, 54-55, 102-3, 130-32, 159-61). Indeed, when it was brought to the attention of the Brotherhood's President that its officials were actually requesting fees to represent Negro firemen's grievances, the Brotherhood nevertheless refused to send out instructions for the discontinuance of this discriminatory practice (J.A. 225-226).

What is as significant as this detailed showing of hostility, nonrepresentation and misrepresentation by the Brotherhood is the total absence of any attempt at refutation. *None* of the local Brotherhood officials to whom petitioners' witnesses ascribed hostile and discriminatory conduct were called in rebuttal.[7] Thus, the Court has before it the detailed and unrebutted testimony of eight victims of the Brotherhood's continuing discrimination as a concrete basis for decision of the question whether peti-

[6] Since labor representatives on the National Railroad Adjustment Board, the ultimate statutory arbiter of grievances, are appointed by the Brotherhood (and other unions barring Negroes from membership), Negro firemen are denied any voice in the selection of their representatives on the exclusive statutory forum for the consideration of their employment grievances.

[7] The Brotherhood's case, as presented by three of its highest officials, amounted to no more than a series of self-serving generalizations concerning Brotherhood policies which provided no refutation whatever of the specific testimony concerning specific accounts of discrimination by specified Brotherhood officers (J.A. 168, 243, 271).

tioners' exclusion from membership violates the Constitution and the Railway Labor Act because it results in *actual discrimination* against Negro firemen.

Petitioners might have rested on their showing of inherent inequality (Point IA, *supra*) and of actual day-to-day discrimination (Point IB). But, in an especial effort to give the courts a clear and concrete picture of the impact of exclusion from membership upon Negro firemen, petitioners went even further—they demonstrated that the current major bargaining objectives of the Brotherhood actually work to the primary disadvantage of the Negro firemen, emphasizing the indispensability to their self-protection of the political power that goes with membership:

C. *Primary Disadvantage Suffered by Negro Firemen under the Brotherhood's Current Major Bargaining Objectives*

As important as petitioners' demonstration of day-to-day misrepresentation and nonrepresentation of their interests by the statutory bargaining representative, is petitioners' showing that the Brotherhood is using its broad bargaining power to the *primary disadvantage* of Negro firemen. Petitioners proved at the trial that the Brotherhood has recently bargained and is continuing to bargain "spread the work" modifications in working conditions inuring to the particular disadvantage of the group of *senior* firemen, which necessarily includes most or all the Negroes. In particular petitioners emphasized 1) the reduction, for the benefit of junior firemen, of the monthly mileage made available to senior firemen, 2) the application of a "gouge" rule to take mileage from a high-mileage, senior fireman, for the benefit of junior firemen, 3) the special privileges recently accorded to white engineers "demoted"

to firing, and 4) the bargaining of a compulsory retirement age of seventy with immediate impact on the older, senior firemen (J.A. 42-52, 85-86, 101-105, 120-121, 136-137). Since on all the railroads where Negro firemen are employed they constitute the senior group of firemen (by virtue of denial in the past of opportunity for promotion to engineer and the failure of most railroads to hire any new Negro firemen since 1941), *every one of these major policies of the Brotherhood, designed to reduce working opportunities of senior firemen, operates to the primary disadvantage of the Negroes.* And while there was sharp disagreement between the parties as to whether these major Brotherhood policies are *racially motivated,* there was no conflict whatever concerning the fact that the Negro firemen are primary losers under these current objectives of the Brotherhood. As the Brotherhood conceded in its District Court brief (at p. 23):

> "On those seniority districts on which Negro firemen are employed, the Negroes are usually the oldest firemen and have the greater seniority. Hence, they hold the preferred runs, which is generally tantamount to saying that they hold the jobs on which the largest earnings can be made per month. When the mileage limitation rules are applied to these jobs on the southeastern railroads, *it is usually the Negro firemen who are adversely affected by the rule*" (emphasis supplied).

Thus, whether racially motivated or not, the Brotherhood is bargaining changes in the mileage rules under which it concedes that "it is usually the Negro firemen who are adversely affected." It is difficult to conceive of a more tangible need or a more concrete basis for affording Negro firemen equal political voice and power within their statu-

tory representative than the fact that the statutory power is presently being used to the primary disadvantage of the excluded Negroes. And the fact that the very Negro firemen who are excluded from the bargaining process are the firemen most adversely affected thereby, gives concrete emphasis to petitioners' showing both of the inherent inequality of exclusion and of the discriminatory impact of exclusion.

. . . . . .

The record thus provides this Court with a specific, detailed and unrebutted showing (i) that exclusion from membership results in exclusion from voice, vote and every phase of participation in the statutory bargaining process; (ii) that exclusion from membership results in actual discrimination through hostility, nonrepresentation and misrepresentation; and (iii) that the current bargaining objectives of the Brotherhood, whether racially motivated or not, primarily disadvantage excluded Negro firemen. This would appear to be not only an *ample* but an *optimum* context for a decision by this Court on the statutory and constitutional issues flowing from both the inherent inequality of exclusion and the actual discriminatory results of exclusion.

We turn now to demonstrate that this unrebutted record of inherent and actual inequality in the statutory bargaining process remains unimpaired; nothing in the opinions below could have, or has, rendered "abstract" the very real, tangible and concrete record of racial inequality which cries out for the remedial hand of this Court.

II

Nothing in the Opinions Below Renders Abstract Rather than Concrete the Issue of Racial Exclusion from the Statutory Bargaining Agent

We have just demonstrated that the record presents the issue of racial exclusion in a concrete not an abstract context. Nothing in either of the opinions below renders this issue any less concrete.

After the trial, the parties filed detailed requests for findings and conclusions of law in accordance with Rule 52(a) (J.A. 2). Instead of making such findings and conclusions, however, the District Judge filed a memorandum opinion (J.A. 298-304) containing certain findings of fact and legal conclusions which he deemed "compliance with Rule 52(a)" (J.A. 304). Apparently the District Judge did not feel called upon to make detailed findings on questions of nonparticipation and of discrimination, for he stated that "the factual questions respecting inequality, discrimination and other related complaints presented in evidence have no bearing upon the single question to be resolved" (J.A. 299) and "the presence or absence of actual unequal treatment by the representative is immaterial" (R. 302). What rendered the factual questions concerning unequal treatment and discrimination "immaterial" in the District Judge's mind was his belief that the union was a "private association" and a "voluntary organization" which was not subject to statutory or constitutional limitations of fair play (J.A. 303).

But even though the District Judge found it unnecessary to go into detail on the factual issues of nonparticipation and discrimination because his view of the law rendered such proof immaterial, he nevertheless made clear his own views on these factual issues. He assumed (R. 300), and

of course he could not have done otherwise in view of the Brotherhood's admissions, that Negro firemen are denied any participation whatever in the statutory bargaining process. He found, in so many words, that "the evidence presented establishes the fact that these plaintiffs and the members of their class *are discriminated against in respect of their representation* and participation; *their condition of employment*, and other matters relating to such employment" (R. 300); and, to the same effect, he expressly accepted petitioners' "showing of *actual discriminatory representation* by the Brotherhood" (R. 301) (emphasis supplied). Finally, he assumed, and again he could not have done otherwise in view of the Brotherhood's admissions, that Negro firemen are the principal losers from the Brotherhood's major bargaining objectives in spreading the work (J.A. 298-299), although he was unwilling to "state definitely that this Brotherhood adopted these practices *for the purpose of* discriminating against the Negroes" (J.A. 299) (emphasis supplied). Thus, the only and extremely limited factual determination which the District Court made against the petitioners was that, with respect to the Brotherhood's admitted bargaining objective in spreading the work, the Court was unable to "state definitely" that it was racially motivated.

In sum, the posture of the case as it left the District Court was as follows:

(a) The petitioners' undisputed proof that exclusion from membership resulted in complete nonparticipation in the statutory bargaining process (Point I A, *supra*)—i.e., inherent inequality—was assumed by the District Court.

(b) The petitioners' unrebutted proof of hostility, misrepresentation, nonrepresentation and discrimination (Point I B, *supra*)—i.e., of actual inequality

—was found as a fact in so many words by the District Court.

(c) The petitioners' proof, conceded by the Brotherhood, that Negro firemen are primary losers under the Brotherhood's major bargaining objective of spreading the work (Point I C, *supra*) was assumed by the District Court.

The two-judge per curiam opinion of the Court of Appeals likewise accepts petitioners' showing of nonparticipation in the bargaining process, for it recites at the outset that "a Negro fireman cannot become a member of the Brotherhood under existing provisions of the Brotherhood's Constitution, nor may any firemen who are not members of the Brotherhood attend meetings of its local lodges" (Petition, p. 24). But, on the issue of discriminatory representation as distinguished from nonparticipation, the court below misread the District Court's opinion. What it did (see Petition, p. 26) was to treat the District Court's inability to "state definitely" that the spread-the-work bargaining objective of the Brotherhood was "for the purpose of discriminating against the Negroes" as if the District Judge had "decided the facts pertaining to discrimination adversely to the contention of appellants" (Petition, p. 26). In other words, the Court of Appeals mistook the District Court's limited finding that the spread-the-work objective of the Brotherhood was not racially motivated, for the broader finding that there had been no actual discrimination whatever and did this *in the face of the specific recitals by the District Court that such actual discrimination had been shown* (see p. 14, *supra*). The court below, by quoting the limited adverse holding by the District Judge on the question of racial motivation for the Brotherhood's spread-the-work objective, and by failing to quote or even mention the District Judge's affirmative findings on

actual discriminatory representation, gave the District Court's opinion an interpretation directly opposite to that expressly stated by the District Court.

It was this misunderstanding of the District Court's opinion that led the court below (Petition, p. 28) to state that "the issue of actual discrimination by the Brotherhood" had been "subtracted from the issue by the findings of the district judge." Quite possibly it is this sentence which caused this Court to conclude that there was something "abstract" about the record. We respectfully submit that this misstatement by the Court of Appeals can not render abstract what we have been at such pains to show is in fact a concrete record of discrimination. The District Judge found and, on the admitted facts had no choice but to find, actual discrimination in the representation which excluded Negro firemen are receiving from their statutory bargaining agent. The Court of Appeals' misreading of the District Judge's opinion cannot alter the state of the record adduced before and recognized by him.

Moreover, even if this Court should, contrary to the showing just made, believe that the court below correctly read the District Court opinion when it said that the "issue of actual discrimination" had been "subtracted from the issue by the findings of the district judge," this would by no means place the questions presented in an "abstract context". Let us assume—contrary, we submit, to the record and to the opinions below—that both the District Court and the Court of Appeals found that there had been no actual discrimination by the Brotherhood and as a result the "two-court rule" (see, e.g., *Page* v. *Rogers*, 211 U.S. 575, 577) excludes this issue from the consideration of this Court. Even in this circumstance, however, there would nonetheless be presented to the Court the extremely concrete issue of inherent inequality based upon the detailed

factual account of deprivation of participation in the statutory bargaining process extracted from the Brotherhood in the course of this litigation. The issue whether racial exclusion in the exercise of statutory bargaining power renders excluded Negroes "inherently unequal" is no more abstract than the issue presented in *Brown* v. *Board of Education*, 347 U.S. 483. Indeed, as this Court pointed out in *Brown* (at pp. 488, 492), it was precisely because the lower courts had found equality in school facilities (i.e., that the issue of actual discrimination had been subtracted from the cases) that the Court was required to decide the question of inherent inequality. This Court made clear in *Brown* that it is *only* when no immediate inequality in tangible matters is presented that it will decide the "abstract" issue of racial segregation; to imply that this Court will not decide the question of inherent inequality in the statutory bargaining process in the absence of findings below of actual discrimination is to say that it will never decide that question, for the presence of such findings of discrimination will always render decision of the general (i.e., inherent inequality) question unnecessary.

To reduce the existing situation to its simplest terms, either the court below was wrong or it was right and in either event the questions presented are in a concrete rather than an abstract context. If the court below was *wrong*, as we confidently assert, and the issue of actual discrimination in the day-to-day bargaining could not be and has not been subtracted from the case, then obviously this Court has an appropriate record before it for deciding the vital questions presented in a context of both actual discrimination and inherent inequality. If, on the other hand, the court below was *right* and the issue of actual discrimination has been subtracted from the case, the question of inherent inequality is nonetheless presented to the

Court in the concrete context of detailed facts on nonparticipation and in the only form in which it can ever be decided, namely, after the issue of discrimination has been removed from the case. While a determination whether the court below was right or wrong may have some effect on the questions that would be before the Court, it does not have any effect upon the nature of the record which is concrete, specific and detailed in either event.

III

Since the Questions Are Presented by this Record in a Concrete Rather than in an Abstract Context, the Appropriate Course Is Either to Review the Case or to Remand for Clarification

There are three alternative approaches to petitioners' case in its present posture before this Court:

1. If petitioners are correct—as we confidently assert—in urging that the showing of actual discrimination has not been impaired by the decision of the court below, the questions presented are before this Court in the most concrete manner possible. If this Court, on reconsideration, now agrees with petitioners on this point, the appropriate remedy—the questions presented being of obvious and admitted importance—would be to grant the petition for rehearing, issue the writ of certiorari and review the case.

2. If petitioners are incorrect and the decision of the court below could and did substract the issue of actual discrimination from the case, the question of inherent inequality is nevertheless presented for decision in the most concrete fashion in which that issue can ever be presented. In this event, too, the appropriate remedy—the questions presented being of obvious and admitted importance—

would be to grant the petition for rehearing, issue the writ of certiorari and review the case.

3. There is the likelihood, however, as we indicated at the outset of this Petition for Rehearing (p. 2, *supra*), that what the Court took for *abstraction* was the *confusion* in the decision below and that the Court's real difficulty is that it cannot determine whether the issue of actual discrimination has in fact been subtracted from this case. We respectfully suggest, however, that petitioners ought not be penalized for the confusion in the decision below. Rather, if what is troubling this Court is the fact that it cannot determine whether the issue of actual discrimination has been subtracted from the case, *the appropriate remedy would be to remand to the court below for the clarification of its opinion or to the District Court for more specific findings of fact upon which the Court of Appeals could base its clarification.*

Indeed, in circumstances similar to those presented herein, without deciding the merits this Court has remanded for appropriate clarification of the facts. Its practice in this regard is reviewed, with pertinent citations, in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

Particularly where questions of constitutional or general public importance have hinged on facts not determined or announced with sufficient clarity by the lower courts, this Court has remanded for the necessary clarifying action. See, e.g., *City of Hammond* v. *Schappi Bus Line*, 275 U.S.

169; *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194; *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543; *Interstate Circuit* v. *United States*, 304 U.S. 55; *Chicago, Milwaukee & St. Paul R'way* v. *Tompkins*, 176 U.S. 167.[8] These precedents are especially applicable here where the questions presented are of such vital public importance, the injustice of the decision below so great, and the effect of denying review so final.[9]

Conclusion

The record which petitioners built in the District Court was as detailed, as specific and as concrete as any that will ever come before this Court on the concededly important issues here presented. The record contains the detailed admissions of the Brotherhood as to the complete exclu-

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[8] *Cf.* dissenting opinions of Mr. Justice Frankfurter in *Hood & Sons* v. *DuMond*, 336 U.S. 525 at 574; *Zorach* v. *Clauson*, 343 U.S. 306 at 322; and see Note, 49 Harv. L. Rev. 631, "The Presentation of Facts Underlying the Constitutionality of Statutes."

[9] There is an additional and compelling reason for this Court to adopt one of the three above alternatives rather than to leave this case in its present posture: The Court's stated ground for denial of certiorari creates a very real two-fold uncertainty as to this Court's future disposition of racial exclusion and segregation cases. First, this Court's characterization as "abstract" of a record of discrimination as "concrete" as humanly possible will doubtless be effectively pressed upon lower courts as grounds for abstention in identical or analogous racial situations wholly unintended by this Court. Second, the Court's refusal to review the issue of inherent inequality, when contrasted with its action in reviewing that very issue in *Brown* and subsequent cases (see pp. 16 to 18, *supra*), can only create confusion in the lower courts in numerous racial exclusion and segregation cases. In an area of litigation already fraught with major difficulties, it becomes doubly important that this Court, if it intends to apply as-yet unstated justiciability requirements, provide sufficiently detailed guidance to avoid confusion and uncertainty in their application. Whatever may have been the reason for this Court announcing its grounds for denial of review and whatever may have been intended by the words "abstract context", it is submitted that only a full review of the record and an elaboration of this Court's difficulties therewith, if any should remain after such a review, will provide others with the guidance necessary to avoid fatal pitfalls in this critical area of constitutional litigation.

sion of Negro firemen from the statutory bargaining process, admissions carefully extracted from the Brotherhood on every facet of nonparticipation. It contains detailed and unrebutted evidence of actual day-to-day discrimination by the bargaining agent. It contains detailed and unrebutted proof that the major bargaining objectives of the Brotherhood primarily disadvantage the excluded Negro firemen. We respectfully submit that, on such proof, any confusion in the decision of the court below ought not penalize the petitioners and their class—elderly Negro firemen whose last chance for first class citizenship rests on this petition.

It is respectfully submitted that the petition for rehearing should be granted, the writ of certiorari issued, and the questions raised reviewed by this Court. If, however, the Court should desire clarification of the decision of the court below, it is respectfully submitted that the appropriate remedy is remand for purposes of such clarification.

Respectfully submitted,

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Certificate

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified by Rule 58 of this Court.

JOSEPH L. RAUH, JR.